IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY D. DAWSON
Plaintiff,

v.

THE CITY OF BARTLESVILLE, OKLAHOMA, CHIEF STEVEN BROWN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ROBERT E. METZINGER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, AND THE BARTLESVILLE POLICE OFFICERS ASSOCIATION, LOCAL 97, IUPA, AFL-CIO,
Defendants.

Case No. 95-C-234-K

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41 (a) (1) of the Federal Rules of Civil Procedure, the parties hereby stipulate to a Dismissal With Prejudice of Plaintiff's causes of action in this case against Defendant, The Bartlesville Police Officers Association, Local 97, IUPA, AFL-CIO.

Dated this 29th day of March, 1996.

SOBEL & LANGHOLZ

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ATTORNEY FOR DEFENDANT,
UNION

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NELDA CARTER,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,[1]

Defendant.

Case No: 92-C-351-W

RULE 58 JUDGMENT

Judgment is entered in favor of the Plaintiff, Nelda Carter, in accordance with this court's Order and Judgment filed March 21, 1996.

Dated this 26th day of March, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

[1] Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

H.D. HULETT,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,[1]

Defendant.

Case No: 92-C-136-W

RULE 58 JUDGMENT

Judgment is entered in favor of the Plaintiff, H.D. Hulett, in accordance with this court's Order and Judgment filed March 15, 1996.

Dated this 26th day of March, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EL PASO NATURAL GAS COMPANY,
PLAINTIFF,
vs.

WINDWARD ENERGY & MARKETING COMPANY and MARK A. PERRY,
DEFENDANTS,
and

WINDWARD ENERGY & MARKETING COMPANY and GOLDEN NATURAL GAS COMPANY,
COUNTER-PLAINTIFFS,
vs.

BURLINGTON RESOURCES, INC.,
EL PASO NATURAL GAS COMPANY,
MERIDIAN OIL HOLDING INC.,
MERIDIAN OIL, INC.,
MERIDIAN OIL TRADING, INC.,
MERIDIAN OIL HYDROCARBONS, INC.,
MERIDIAN OIL MARKETING, INC.,
and MERIDIAN OIL GATHERING, INC.,
COUNTER-DEFENDANTS.

CASE NO. 92-C-649-H

REPORT AND RECOMMENDATION

The following motions have been referred to the undersigned United States Magistrate Judge for Report and Recommendation: DEFENDANTS WINDWARD AND MARK A. PERRY'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT [DKT. 184]; MERIDIAN COUNTERDEFENDANT'S MOTION TO DISMISS ALL COUNTERCLAIMS FOR LACK OF SUBJECT MATTER JURISDICTION [DKT. 188]; MERIDIAN COUNTERDEFENDANT'S MOTION FOR SUMMARY JUDGMENT [DKT. 217]; EL PASO NATURAL GAS COMPANY'S MOTION FOR SUMMARY JUDGMENT ON TORT AND CONTRACT CLAIMS [DKT. 220]; MOTION OF WINDWARD ENERGY AND MARKETING COMPANY AND GOLDEN NATURAL GAS FOR

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PARTIAL SUMMARY JUDGMENT [DKT. 230]; and WINDWARD/GOLDEN'S MOTION TO DISMISS GOLDEN AS A COUNTERPLAINTIFF [DKT. 282].[1]

I. BACKGROUND

A. THE PARTIES

Plaintiff, **EL PASO NATURAL GAS, CO.** ("El Paso") is a Delaware corporation with its principal place of business in El Paso, Texas. El Paso owns and operates a natural gas pipeline in the San Juan basin of New Mexico.

Defendant and Counterplaintiff, **WINDWARD ENERGY & MARKETING, CO.** ("Windward") is an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma. Under certain transportation service agreements ("TSAs") Windward is a Shipper on El Paso's pipeline system.

Defendant, **MARK A. PERRY** ("Perry") is an Oklahoma domiciliary and the sole shareholder and director of Windward. He is also the sole shareholder and officer of Golden Natural Gas, Co.

Counterplaintiff, **GOLDEN NATURAL GAS, CO.** ("Golden") is a Texas corporation with its principal place of business in Tulsa, Oklahoma. Golden's corporate charter was forfeited on June 17, 1990 for failure to pay Texas franchise taxes. Perry became sole shareholder and officer of Golden in May 1990 when Golden's stock was purchased with a Windward check. The

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[1] *Due to the large number of briefs and exhibits involved, their lengthy titles, and the fact that several documents related to more than one motion were often filed on a single day, all filed documents and exhibits are referred to by their docket number [Dkt.], and where appropriate, page, paragraph, or tab number.*

stock, however, was issued to Perry. Mr. F. Brian Broaddus acquired 20% of Golden's stock in August 1990 and served as president until 9/10/91, when Perry reacquired Broaddus's stock.

Under certain transportation service agreements ("TSAs") Golden is a Shipper on El Paso's pipeline system.

Counterdefendant **BURLINGTON RESOURCES, INC.** ("Burlington") is a Delaware corporation with its principal place of business in Seattle, Washington and an office in Santa Fe, New Mexico. Burlington is the parent corporation of the Meridian Company counterdefendants. Burlington was also the parent company of El Paso until March 1992, when a public offering of 15% of El Paso's common stock was made.

Counterdefendants **THE MERIDIAN COMPANIES** ("Meridian") include the following entities: Meridian Oil Holding, Inc., Meridian Oil Inc., Meridian Oil Trading Inc., Meridian Oil Hydrocarbons Inc., Meridian Oil Marketing Inc., and Meridian Oil Gathering Inc. These companies are all Texas corporations and wholly owned subsidiaries of Burlington. They are engaged in various aspects of exploration, development, production, marketing, transmission and distribution of natural gas, oil, and natural gas liquids.

B. TECHNICAL INFORMATION

The San Juan basin is a natural gas producing area in Northwest New Mexico which extends into Southwest Colorado. The term "gas" or "natural gas" refers to a gaseous petroleum hydrocarbon removed from geologic formations beneath the surface of the earth by means of wells. Common units of measure of gas are: Mcf - thousand cubic feet; MMcf - million cubic feet; Bcf - billion cubic feet; Mbtu - thousand British thermal units; MMBtu - million British thermal units.

processing. After processing the gas for NGL removal, the natural gas without the NGLs was delivered to Windward/Golden's customers via a second pipeline. In addition, pursuant to a separate agreement between Windward and El Paso known as the Liquids-In-Kind Agreement ("LIK") , the NGLs were delivered to Windward.

C. THE RELATIONSHIPS

Pursuant to FERC regulations, El Paso files tariff sheets with the FERC setting forth the rates and terms of service on its pipeline system.

El Paso and Windward entered into various transportation service agreements ("TSAs") for the transportation and gathering of natural gas on El Paso's system, with Windward being a Shipper on the system. Golden and El Paso have also entered into TSAs. The rates, terms and conditions are established by FERC tariffs.

El Paso and Windward entered into a Liquids-in-Kind ("LIK") Agreement which permits Windward to receive NGLs removed from the gas stream, in kind, according to the same composition as is determined to be coming from the wellheads.

In January 1991, on behalf of Windward and Golden, Mr. Perry signed what the parties refer to as a business realignment agreement whereby, among other things, El Paso and Windward/Golden agree that Windward and Golden's obligations to El Paso are "joint and several."

D. THE CLAIMS

1. COMPLAINT

El Paso sued only Windward and Perry. Windward is allegedly the alter-ego of Perry.

El Paso claims that its tariff permits it to discontinue service to a shipper for the shipper's failure to pay bills for gas transportation or for failure to demonstrate credit worthiness.

El Paso performed services under the TSAs until June 28, 1992 when it terminated its services for Windward/Golden's:

(1) Refusal to pay delinquent invoices for pipeline services in the amount of $335,756.24; as of 9/15/94, the amount is $481,861.49 due to the accrual of late charges, the current amount due is unclear from the record;

(2) Failure to correct negative gas imbalances of 531,600 MMBtus and liquid imbalances of 140,119 gallons of ethane; and

(3) Failure to demonstrate credit worthiness.

El Paso's claims for relief are:

1. Declaratory Judgment that suspension of service was proper under the tariffs, the TSAs, and applicable federal and state law;

2. Recovery of damages for breach of contract;

3. Compensation for unjust enrichment of Windward and Perry occasioned by the provision of uncompensated transportation services and El Paso's over delivery of natural gas for Windward/Golden (natural gas imbalance).

Windward and Perry claim that, to the extent El Paso has claims against them, they are subject to set off by their counterclaims.

2. COUNTERCLAIMS

Counterclaims asserted by Windward and Golden against El Paso, Burlington, and Meridian:

(a) Damages and injunction for monopolization, attempt and conspiracy, illegal combinations by virtue of transfers of assets between and among counterdefendants **[Senior Judge Ellison granted summary judgment against Windward/Golden on these claims by Order dated 2/24/94, Dkt. 165]**;

(b) **Tortious breach of contract by El Paso**. Windward claims El Paso's failure to deliver NGLs is a tortious breach of contract; punitive damages are sought;

(c) **Conversion of NGLs by Meridian**. Windward/Golden allege El Paso systematically failed to deliver a portion of Windward's NGLs causing damages in the approximate amount of $5 million. Windward/Golden allege that the under delivered NGLs were diverted to Meridian Oil Hydrocarbons Inc. ("MOHI");

(d) **Tortious interference with contract by Meridian**. Windward claims the Meridian Companies knew of the essential terms of the El Paso/Windward LIK Agreement and intentionally interfered with the same, punitive damages are sought;

(e) **El Paso's interference with business relationships**. Windward/Golden claim El Paso confederate Brian Broaddus obtained employment with Windward/Golden essentially to steal Windward/Golden's business;

(f) **Misappropriation of trade secrets by El Paso**. Windward/Golden claim that Mr. Broaddus conducted surveillance and monitoring of Windward/Golden for El Paso and reported confidential proprietary and trade secret information, including procuring a copy of a draft complaint Windward/Golden planned to file against El Paso in federal court in New Mexico, causing El Paso to preemptively file this action.

(j) **Civil conspiracy** for all of the above.

II. SUPPLEMENTAL JURISDICTION

The Meridian defendants seek dismissal from this action for lack of subject matter jurisdiction [Dkt. 188]. All the Meridian Companies, except Burlington, were incorporated in Texas, as was Golden. Since Windward/Golden's federal antitrust claims were dismissed by Senior Judge Ellison's February 24, 1994 Order [Dkt. 165], the only claims remaining against the Meridian defendants are Windward/Golden's claims for conversion and tortious interference with contract. The Meridian defendants maintain that the absence of complete diversity between themselves and Golden destroys the Court's jurisdiction over Windward/Golden's state law claims.

The question of the Court's supplemental jurisdiction over these claims is determined by 28 U.S.C. § 1367:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if --
>
> > (1) the claim raises a novel or complex issue of State law,
> > (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> > (3) the district court has dismissed all claims over which it has original jurisdiction, or
> > (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Under § 1367, the Court must first determine whether Windward/Golden's claims are "so related to claims in the action" over which the Court has jurisdiction "that they form part of the same case or controversy under Article III of the United States Constitution." Claims are part of the same case or controversy when they derive from a common nucleus of operative facts and a plaintiff would ordinarily be expected to try all of them in one proceeding. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 6 L. Ed. 2d 218 (1966); *Bank of Okl. N. A., Grove Branch v. Islands Marina*, 918 F.2d 1476, 1479-80 (10th Cir. 1990). The Court finds that Windward/Golden's allegations that Meridian converted its NGLs through manipulation of NGL nominations derive from the same facts and are dependent upon the success or failure of other claims that El Paso breached the LIK agreement so as to satisfy this requirement. See *Bank of Okl.* , 918 F.2d at 1480.

Next, the Court must examine the basis for the Court's original jurisdiction in this case. According to the terms of § 1367, subsection (b) applies if the Court's original jurisdiction is founded **solely** on diversity of citizenship. If § 1367(b) applies, as Meridian argues it must, the Court is prohibited from exercising supplemental jurisdiction over claims against any party whose

presence destroys complete diversity.[2] The Court rejects Meridian's assertion that subsection (b)

presence destroys complete diversity.[2] The Court rejects Meridian's assertion that subsection (b) must apply since the federal question claims have been dismissed. It is well established that jurisdiction over state claims is discretionary when federal claims have been dismissed. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7, 108 S.Ct. 614, 619 n.7, 98 L.Ed. 2d 720 (1988); *Sullivan v. Scoular Grain Co. of Utah*, 930 F.2d 798, 803 (10th Cir. 1991).

In its original complaint, El Paso sought, inter alia, declaratory judgment that its suspension of service to Windward and Golden was proper and valid under its FERC gas "Tariff, the TSAs and applicable federal and state law" [Complaint, Dkt. 1, ¶ 31]. The Declaratory Judgment Act (DJA) allows an interested party to have its rights and other legal relations declared by a federal court. See 28 U.S.C. § 2201. However, it is well-settled that the DJA itself does not confer jurisdiction on a federal court where otherwise none exists. *Henry v. Office of Thrift Supervision*, 43 F.3d 507, 511 (10th Cir. 1994); *Baird v. Seamans*, 507 F.2d 765, 767 (10th Cir. 1974). In other words, federal jurisdiction attaches only if there is a federal question or diversity of citizenship. As a rule, the existence of a federal question raised as a defense does not suffice to confer jurisdiction, even if the complaint anticipates the defense and incorporates the federal question. *Louisville & N.R. Co. v. Motley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). However, in a declaratory judgment action, the court determines whether a substantial federal question arises from the defendant's threatened action which the declaratory judgment action seeks

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[2] *Based on the practice commentary following § 1367, Windward and El Paso argue that subsection (b) applies only to prohibit the exercise of supplemental jurisdiction over claims made by plaintiffs against those made parties under Fed. R. Civ. P. 14, 19, 20 or 24. Since Windward was not originally a plaintiff, and the Meridian defendants were made parties under Rule 13(h), not one of the enumerated rules, they assert that application of § 1367(b) does not result in a lack of subject matter jurisdiction. The Court declines to address these arguments because the Court concludes that subsection (b) does not apply.*

to prevent. If the cause of action that would have been brought absent the declaratory judgment action, could have proceeded in federal court, the federal court has subject matter jurisdiction over the declaratory action. *Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 19, 103 S. Ct. 2841, 2846, 77 L. Ed. 2d 420 (1983); *West 14th Street Commercial Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188, 194 (2nd Cir. 1987).

According to the Complaint in this case, El Paso's claims arise under the Natural Gas Act, 15 U.S.C. §§ 717-717W, the Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432, and the Sherman Anti-Trust Act, 15 U.S.C. § 1, [Dkt. 1, ¶ 5]. On the face of the Complaint, subject matter jurisdiction over El Paso's claims against Windward/Perry exists under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1332(a) (diversity). At this point in the litigation it is clear that, despite the language in the Complaint, El Paso does not assert rights arising under the Natural Gas Act or the Natural Gas Policy Act. It is also clear that the threatened action El Paso's declaratory action sought to avoid was the Windward/Golden claim that El Paso's suspension of service violated federal antitrust laws. Indeed, the Windward/Golden counterclaims allege "violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 and sections 3 and 7 of the Clayton Act, 15 U.S.C. §§ 14 and 18" [Dkt.147, p. 9, ¶ 1]. Unquestionably, federal question jurisdiction over these claims exists by virtue of 15 U.S.C. § 15 which provides, in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to amount in controversy, . . .

The Court concludes that original federal jurisdiction exists over El Paso's declaratory judgment action, irrespective of diversity of citizenship.

Since original jurisdiction over this matter is not founded solely on diversity of citizenship, the terms of 28 U.S.C. § 1367(b) are not applicable. Accordingly, the absence of diverse citizenship between Meridian and Golden does not require dismissal of Windward/Golden's counterclaims against Meridian for want of jurisdiction. Rather, the question of the Court's exercise of supplemental jurisdiction over Windward/Golden's state law claims is governed by § 1367(a) and (c).

Section 1367(a) provides: "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." Having determined that Windward/Golden's state law claims are part of the same case or controversy, supplemental jurisdiction is established. The question then becomes, whether, aided by the provisions of § 1367(c), the Court should decline to exercise its supplemental jurisdiction.

According to § 1367(c) the Court may decline to exercise supplemental jurisdiction under these circumstances: (1) the claim raises a novel or complex question of state law; (2) the claim substantially predominates over the claim or claims over which the court has original jurisdiction; (3) the court has dismissed all claims over which it has original jurisdiction, or (4) there are other compelling reasons for declining jurisdiction. None of the parties assert that Windward's claims for conversion and tortious interference with contract involve complex questions of state law. Thus, the first limitation is inapplicable. At the hearing, Meridian argued, and the Court finds it to be true, that Windward/Golden cannot recover on their claims against Meridian unless it is

first established that El Paso breached the LIK agreement. A finding that El Paso had timely delivered all Windward was entitled to receive under the LIK agreement would effectively eliminate all the claims against Meridian. It cannot be said, therefore, that Windward's counterclaims against Meridian substantially predominate in this suit. Accordingly, the second limitation is inapplicable.

Although the Court's February 24, 1994 Order granted summary judgment on the antitrust claims, thereby eliminating them from this suit, the Court still has original jurisdiction over the remaining claims and counterclaims (except for Golden's claims against Meridian) by virtue of diversity. Therefore, the third limitation is inapplicable. Finally, the Court finds there are no compelling reasons for declining jurisdiction. Rather, the Court finds that, considering the long pendency of this lawsuit and the extensive discovery and briefing already performed, it would be wasteful to decline to exercise supplemental jurisdiction over Windward/Golden's claims against Meridian.

The undersigned United States Magistrate Judge therefore recommends that the Meridian Counterdefendant's Motion To Dismiss All Claims Against Meridian Counterdefendants For Lack of Subject Matter Jurisdiction [Dkt. 188] be DENIED.

III. GOLDEN'S STATUS AS A PARTY

Counter-Plaintiffs Windward and Golden have moved to drop Golden Natural Gas Company as a counterplaintiff [Dkt. 282] to remove the "jurisdictional cloud" raised by the lack of diversity between Golden and the Meridian defendants. Having found that no jurisdictional cloud exists, the undersigned United States Magistrate Judge recommends that the motion [Dkt. 282] be DENIED.

IV. SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings, affidavits and exhibits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). To survive a motion for summary judgment, the nonmoving party "must establish that there is a genuine issue of material fact" and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1455-56, 89 L.Ed.2d 538 (1986).

V. LIABILITY OF MARK A. PERRY

Mark A. Perry ("Perry") seeks summary judgment that he has no personal liability to El Paso [Dkt. 184]. El Paso seeks summary judgment that: pursuant to the business realignment agreement, Windward and Golden are jointly and severally liable for debts owed to El Paso; Perry is statutorily liable for Golden's debts; and Perry is liable for Windward's debts pursuant to the alter-ego doctrine [Dkt. 220]. In response to Windward and Perry's motion to dismiss and for summary judgment on the issue of Perry's liability [Dkt. 184], El Paso also argues that since Perry is statutorily liable for Golden, and since Golden is jointly and severally liable for Windward's debts under the business realignment agreement, Perry is also liable for Windward's debts. [Dkt. 319, p. 20].

There is no dispute that:

> (1) during the relevant time frame, November 1991 through June 1992 (the months for which Windward/Golden transportation bills remain unpaid), Perry has been the sole shareholder and director of both Windward and of Golden;
>
> (2) Golden's right to do business was forfeited June 14, 1990, pursuant to Tex. Tax Code §§171.251, et. seq., for its failure to pay franchise taxes in the state of its incorporation, Texas;
>
> (3) on December 10, 1990, Golden's corporate charter was forfeited;
>
> (4) Golden's charter was not reinstated until November 13, 1992. [Dkt.224, Tab. 11];
>
> (5) Perry acquired Golden in August 1990 during the period between the suspension of its right to do business (June 1990) and forfeiture of its charter (December 1990);[3]
>
> (6) from November 1991 through June 1992, natural gas was transported on El Paso's pipeline pursuant to TSAs between Windward/Golden and El Paso;
>
> (7) on January 31, 1991, on behalf of Windward and Golden, Perry signed what the parties have referred to as a business realignment agreement. Contained within this agreement is the provision that "the obligations of Windward and of Golden shall be joint and several." [Dkt. 224, Tab 3].

The basis of El Paso's complaint is that transportation fees, late charges and imbalances incurred by Windward/Golden from November 1991 to June 1992 remain outstanding. El Paso argues that according to Tex. Tax Code § 171.255, Perry, as an officer of Golden is personally

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[3] *For a period of time, until September 10, 1991, Mr. Broaddus owned 20% of Golden's stock and served as its president. This fact is immaterial to the personal liability analysis because Broaddus's ownership occurred outside the relevant time frame.*

liable for the debts of Golden incurred during the period of forfeiture. Tex. Tax Code § 171.255 (Vernon 1982) provides, as follows:

> (A) If the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or penalty, each director or officer of the corporation is liable for each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived. The liability includes liability for any tax or penalty imposed by this chapter on the corporation that becomes due and payable after the date of the forfeiture.
>
> (B) The liability of a director or officer is in the same manner and to the same extent as if the director or officer was a partner and the corporation were a partnership.
>
> (C) A director or officer is not liable for the debt of a corporation if the director or officer shows that the debt was created or incurred: (1) over the director's objection; or (2) without the director's knowledge and that the exercise of reasonable diligence to become acquainted with the affairs of the corporation would not have revealed the intention to create the debt.
>
> (D) If a corporation's charter or certificate of authority and its corporate privileges are forfeited and revived under this chapter, the liability under this section of a director or officer of the corporation is not affected by the revival of the charter or certificate and the corporate privileges.

Perry argues against application of § 171.255 to him because the forfeiture was not the result of his actions but was due to the failure of Golden's *former* officers and directors to pay franchise taxes. Perry maintains that only culpable officers of the corporation are subject to liability. Perry relies upon *Schwab v. Schlumberger Well Surveying, Corp.*, 198 S.W.2d 79 (Tex. 1946) as establishing the requirement that an officer be "culpable" for liability to attach. That case applies an earlier version of the statute to dissimilar facts and therefore provides no basis for this Court to decide the issue before it.

The Texas statute makes no requirement of culpability. The plain and ordinary meaning of the words in § 171.255 impose liability for corporate debts incurred after the date on which the tax is due and before corporate privileges are revived. Contrary to Perry's contention, there is no statutory requirement of "culpability." Neither the statute nor recent case law discuss culpability. Instead, § 171.255(C) provides an exemption or "safe harbor" from liability if the officer or director shows the debts were incurred over the director's objection or without the director's knowledge.[4] Neither situation is even asserted in this case.

This case falls squarely within § 171.255. There is no question that Golden's corporate privileges were forfeited. To the extent that Golden incurred debts owing to El Paso, they were incurred during the period of forfeiture. Therefore, in accordance with § 171.255, these undisputed facts mandate the conclusion that Perry is liable for those debts to the same extent as if he were a partner and Golden were a partnership. See *Skrepnek v. Shearson Lehman Brothers, Inc.*, 889 S.W.2d 578 (Tex. App. Hou. 1994).

In addition, pursuant to the business realignment agreement which bears his signature, Perry agreed "the obligations of Windward and of Golden shall be joint and several." [Dkt. 124, Tab 3]. The Court finds that by virtue of Golden's status as a corporation whose corporate privileges had been forfeited, the application of § 171.255, Perry's position as an officer and director of Golden, and the provisions of the business realignment agreement, Perry is jointly and

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[4] *Tex. Tax Code § 171.255(C) contains a slight inconsistency. Subsection (C) states that a director or officer is not liable if the director or officer shows the debt was incurred over the director's objection or without the director's knowledge. Although this inconsistency is not material to the disposition of any issue in this case, the Court notes it to explain the language used by the Court.*

severally liable for Windward's obligations to El Paso incurred after the January 31, 1991 date of the business realignment agreement.

The application of § 171.255 makes consideration of El Paso's contentions regarding piercing the corporate veil of Windward and Golden unnecessary.

The undersigned United States Magistrate Judge recommends that summary judgment on the issue of Mark A. Perry's individual liability for the debts of Windward and Golden be GRANTED in favor of El Paso [Dkt. 220], and Windward and Perry's motion to dismiss, or for summary judgment on the issue of Perry's personal liability [Dkt. 184] should be DENIED.

VI. DECLARATORY JUDGMENT

Defendants Windward and Perry seek dismissal of El Paso's first claim for relief, declaratory judgment [Dkt. 184]. They argue that a request for declaratory judgment is not included in El Paso's proposed amended complaint. El Paso points out that Senior Judge Ellison has already granted judgment on the antitrust issues, and the validity of El Paso's suspension of transportation service will be litigated in conjunction with Windward/Golden's counterclaims.

The Court agrees with El Paso's position that it would be inappropriate to dismiss a claim upon which El Paso has prevailed. Accordingly, the undersigned United States Magistrate Judge recommends that Windward and Perry's motion to dismiss [Dkt. 184] be DENIED.

VII. BREACH OF TRANSPORTATION SERVICE AGREEMENTS

El Paso seeks a money judgment, contending that Windward and Golden breached their obligations to pay undisputed transportation bills under the TSAs [Dkt. 220]. Windward/Golden seek judgment that El Paso was not entitled to suspend Windward/Golden's transportation service for failure to pay undisputed transportation bills, maintaining that under the terms of the tariff,

the existence of a bona fide dispute over El Paso's performance under the LIK Agreement precluded suspension of transportation services and excused Windward/Golden's obligation to pay for transportation service [Dkt. 230].

Reduced to their essence, the TSAs are agreements whereby El Paso agrees to transport natural gas on its pipeline, and Windward/Golden agree to pay for this service. The amount to be charged for the transportation services is set out in the FERC tariff which is incorporated in the TSAs by reference. The TSAs contain a choice of law provision whereby the parties agreed that "the laws of the State of Texas shall govern the validity, construction, interpretation and effect of this Agreement." [Dkt. 245, Tab 20 § 9.1]. Accordingly, Texas law applies to El Paso's claim for breach of the TSAs.

The essential elements of a cause of action for breach of contract are: (1) the existence of a valid contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damage to the plaintiff. *Hussong v. Schwan's Sales Enterprises, Inc.*, 896 S.W.2d 320, 326 (Tex.App.-Hou.(1 Dist.) 1995). In this case the parties do not question the existence of a valid contract, that El Paso transported Windward/Golden natural gas on its pipeline for the months of November 1991 to June 1992, and that the transportation invoices for these months are unpaid. To avoid payment of these invoices Windward/Golden maintain that El Paso's suspension of transportation service occurred in violation of tariff provision 6.4.

According to correspondence from Windward/Golden to El Paso dated January 7, 1992, Windward and Golden elected to withhold payment of transportation invoices for November 1991 totaling $204,093.14 "in protest of El Paso Natural Gas Company's failure to deliver all natural gas liquids owed Windward." [Dkt. 233, Tab 35]. Windward sent El Paso similar letters

concerning withholding payments of transportation invoices for December 1991, January 1992, February 1992, and March 1992. [Dkt. 255, Tab 8].

Windward maintains El Paso had been misallocating natural gas liquids ("NGLs") due it under the liquids-in-kind agreement which resulted in an imbalance whereby El Paso owed Windward NGLs. Windward takes the position that the dispute over NGLs constitutes a bona fide dispute under the terms of the tariff so that El Paso was precluded from discontinuing transportation service. Windward further maintains that El Paso's allegedly wrongful discontinuation of transportation service constitutes a breach of contract which discharges Windward from its "reciprocal obligations" under the TSAs. El Paso counters that the dispute which existed at the time service was suspended was not a "bona fide" dispute within the meaning of the tariff.

6.4 reads, in relevant part, as follows:

> 6.4 Failure to Pay Bills
>
> * * *
>
> Subject to requirements of regulatory bodies having jurisdiction and without prejudice to any other rights and remedies available to El Paso under the law and the executed Transportation Service Agreement, El Paso shall have the right to discontinue transportation service if any bill remains unpaid for thirty (30) days after the due date thereof or if Shipper breaches any of the other terms and conditions of the executed Transportation Service Agreement and, for thirty (30) days after fails to remedy or correct the same; provided, however, that in the event of a bona fide dispute between the parties in respect of breach, or in respect of the amount due under any bill, El Paso shall not have the right to discontinue the transportation of gas for Shipper's account until after the expiration of thirty (30) days from the date of final decision no longer subject to appeal by a court of competent jurisdiction, and not then, unless the decision of the court has determined such dispute in favor of El Paso and against Shipper and Shipper has failed to remedy or correct such violation or breach of

> contract within said thirty (30) day period. Transportation of gas shall be resumed upon remedy of Shipper's breach. Dkt. 245, Tab 3].

Despite Windward/Golden's repeated assertions that El Paso's breach of the LIK Agreement is a reason for not paying transportation bills, 6.4 has nothing to do with breaches by El Paso. 6.4 deals exclusively with El Paso's right to discontinue transportation service based upon Windward/Golden's failure to perform. It provides two situations under which El Paso can discontinue transportation: (1) if Windward/Golden fail to pay their transportation bills within 30 days when there is no bona fide dispute over the amount due; and (2) when Windward/Golden breach any other term of the TSA and there is no bona fide dispute concerning the breach. El Paso relies on the first basis for discontinuation. Regarding transportation bills, 6.4 reads, as follows:

> 6.4 Failure to Pay Bills
>
> * * *
>
> *El Paso shall have the right to discontinue transportation service if any bill remains unpaid for thirty (30) days after the due date thereof . . . provided, however, that in the event of a bona fide dispute between the parties . . . in respect of the amount due under any bill*, El Paso shall not have the right to discontinue the transportation of gas for Shipper's account until after the expiration of thirty (30) days from the date of final decision no longer subject to appeal by a court of competent jurisdiction, and not then, unless the decision of the court has determined such dispute in favor of El Paso and against Shipper and Shipper has failed to remedy or correct such violation or breach of contract within said thirty (30) day period. Transportation of gas shall be resumed upon remedy of Shipper's breach. [emphasis supplied].

The Court must therefore determine whether Windward/Golden failed to pay their transportation bills within 30 days, and if so whether there was a bona fide dispute about the amount due.

Windward's correspondence to El Paso does not disclose that there was any dispute as to the amount due under the transportation bills. In fact, Windward's correspondence simply recaps the amount due under the bill without comment as to its correctness. [Dkt. 233, Tab 35; Dkt. 255, Tab 8]. Tariff Section 6.5 addresses billing disputes and provides a specific procedure and time frame for bringing billing disputes to El Paso's attention. [Dkt. 245, Tab 3]. The tariff instructs the Shipper to notify El Paso of billing disputes by the 25th day of the month during which the bill is due and to provide detailed calculations supporting amounts paid and contested. Windward gave no such notice to El Paso. Even if Windward's claims concerning El Paso's purported breach of the LIK agreement are a bona fide dispute under the terms of the tariff, they do not constitute a dispute over matters such that El Paso is precluded from discontinuing transportation service.

Only *after* El Paso's termination of transportation service did Windward/Golden claim El Paso's bills are incorrect. Windward/Golden now claim that the charges for fuel and shrinkage are contrary to a tariff provision which provides that El Paso will charge "actual fuel/shrinkage as calculated at the end of the production month." [Dkt. 255, Tab 1]. According to the affidavit of Ray Perkins, Director of Field Services Accounting for El Paso, whenever a fuel and shrinkage calculation yields an amount less than 0.5%, it is assumed to be in error because El Paso's experience reveals that when a calculation is less than 0.5% a discrepancy is eventually uncovered which, if corrected, would result in a fuel and shrinkage factor of at least 0.5%. Due to time constraints, El Paso uses 0.5% as the actual fuel and shrinkage percentage and no adjustments are made when discrepancies are found and corrected. [Dkt. 224, Tab 5].

Windward/Golden argue that this procedure is directly contrary to the express terms of the tariff, which terms are to be strictly construed against El Paso as drafter of the tariff. According to Windward/Golden, use of the 0.5% factor constitutes a failure to perform such that Windward/Golden's performance under the TSA is excused. Windward/Golden cite *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 689 (Tex. 1981) in support of this idea. While the *Mead* case contains the language, "[d]efault by one party excuses performance by the other party," it also states "[a] party in default on a contract is not relieved by a subsequent breach by the other party." *Id.* Exhibit 6 to the Perkins affidavit reveals that April, May, and June of 1992 were the only months in which the 0.5% fuel and factor was employed. [Dkt. 224, Tab 5]. Their own correspondence demonstrates Windward/Golden were in default of their payment obligations for November 1991 through March 1992, before El Paso's purported breach. Therefore, Windward/Golden are not relieved of their obligation to pay transportation charges.

Although it might be argued that correction of the fuel and shrinkage allocation would result in a downward adjustment to the transportation bills, the 0.5% factor was only used after Windward/Golden had already quit paying their bills. At the time service was suspended (June 28, 1992), transportation bills from November 1991 to March 1992 had remained unpaid for more than 30 days. The Court concludes no bona fide dispute existed so as to preclude suspension of service under the terms of the tariff. Therefore, under the terms of the tariff El Paso was justified in suspending transportation service to Windward/Golden.[5]

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[5] *El Paso also listed failure to correct negative gas imbalances and failure to demonstrate credit worthiness as reasons for suspension of transportation service. Windward/Golden argue that the tariff does not permit suspension for these reasons. The Court's finding that suspension of service for Windward/Golden's failure to pay transportation invoices was justified under the terms of the tariff makes these other issues irrelevant.*

It is undisputed that: (1) El Paso transported natural gas for Windward/Golden and provided related services from November 1991 through June 1992; (2) El Paso submitted invoices to Windward/Golden for its services; (3) there was no dispute about the amounts due; and (4) Windward/Golden did not pay invoices for November 1991 to June 1992. As a matter of law, Windward/Golden are liable for their breach of contractual obligations to El Paso.

On the record before it, the Court is not able to determine the precise amount of transportation service charges due. The Perkins affidavit and exhibits reflect that, after application of all payments and FERC proceeding refunds, as of September 15, 1994, Windward was indebted to El Paso for transportation and late charges in the amount of $73,914.61; Golden owed $481,861.49 for a total of $555,776.10. [Dkt. 224, Tab 5]. Windward's objection to these amounts suggests, that prior to suspension, Windward made payments not reflected in the Perkins affidavit. Calculation of the amount outstanding should be straightforward, but the record does not contain the materials to permit the Court to perform the calculation. Accordingly there must be a trial on the issue of the amount of transportation fees and late charges due.

The undersigned United States Magistrate Judge recommends that El Paso be GRANTED summary judgment [Dkt. 220] against Windward and Perry on the issue of liability for the unpaid transportation charges incurred by Windward/Golden (see discussion of Perry's liability in § V, pp. 14-18, *supra*); and that Windward/Golden's motion on the same issue [Dkt. 230] be DENIED.

VIII. NATURAL GAS IMBALANCES

In addition to the transportation fees and late charges, El Paso alleges Windward/Golden caused El Paso to deliver more natural gas to Windward/Golden's customers than Windward/Golden put into the pipeline, thereby causing a natural gas imbalance.

Natural gas imbalances are common and expected occurrences in this industry and can occur in favor of the pipeline or the shipper. For example, an imbalance occurs when in a given month a shipper's wells produce less gas than the shipper has directed the pipeline to deliver to the shipper's customers. In this situation the imbalance exists in favor of the pipeline. The shipper is expected to make up the imbalance in accordance with the terms of the TSA between the pipeline and shipper. Likewise, an imbalance occurs when a shipper's wells produce more gas into the pipeline than the pipeline delivers to the shipper's customers in a given month. In such a case the imbalance is in favor of the shipper and the pipeline must make up the imbalance.

According to El Paso, Windward has an outstanding natural gas imbalance of 35,270 MMBtus having a value of no less than $58,195.50 plus interest; Golden has an outstanding natural gas imbalance of 557,507 MMBtus, with a value of $919,886.55 plus interest. Windward/Golden dispute they owe an imbalance in the amount alleged, but in response to El Paso's statement of undisputed facts they admit to having a natural gas imbalance of "approximately 500,000 MMBtus." [Dkt. 254, p.7, ¶¶ 12-13]. However, Windward/Golden have not submitted any evidence to substantiate their claim that the natural gas imbalance is "approximately 500,000 MMBtus."

Windward/Golden maintain that use of the 0.5% fuel and shrinkage factor overstates the imbalance. According to El Paso, use of the 0.5% factor accounts for only 11,351 MMBtus of the imbalance. Windward also claims that El Paso owes it ethane under the LIK agreement and the amount owed would more than offset the natural gas imbalance. Windward/Golden also assert that their imbalances are within the tolerances provided within the tariff and therefore the natural gas imbalances did not justify suspension of transportation service. The Court has previously

addressed the propriety of suspension of transportation service for nonpayment. The existence of a dispute over natural gas imbalances has no impact on that analysis.

El Paso maintains that, due to time constraints, and its experience, it should be permitted to employ the 0.5% shrinkage factor, despite tariff language which provides otherwise. However, El Paso has not presented any legal justification or analysis of its position. Tariff provisions are strictly construed against the carrier as drafter of the instrument. *Penn. Cent. Co. v. General Mills* Co., 439 F.2d 1338, 1340 (8th Cir. 1971). The tariff unmistakably states that the Shipper will be charged "actual fuel/shrinkage as calculated at the end of the production month." [Dkt. 255, Tab 1]. El Paso admits this procedure was not followed. Windward/Golden presented no evidence to contradict the figures presented in exhibit 6 of Mr. Perkins affidavit [Dkt. 224, Tab 5] concerning the impact of using the 0.5% shrinkage factor. The exhibit shows use of the 0.5% factor resulted in a shrinkage allocation greater than actual numbers of 1011 MMBtus for Golden and 11,351 MMBtus for Windward for a total of 12,362 MMBtus. [Dkt. 224, Tab 5, Exhibit 6].

Windward/Golden admit to owing a natural gas imbalance. They place the imbalance at approximately 500,000 MMBtus, less adjustments to compensate for the estimated shrinkage. However, Windward/Golden have not presented any evidence to substantiate their approximation, and therefore have not done more than show there is some metaphysical doubt as to the amount. *Matsushita Elec.*, 106 S.Ct. at 1455-56. El Paso submitted the Perkins affidavit to support its imbalance figure of 592,777 MMBtus. Thus, the Court finds that there is no question of material fact as to the existence of a natural gas imbalance owed by Windward/Golden to El Paso, nor does the record disclose the existence of a question as to the amount. The undisputed evidence demonstrates that Windward/Golden owe El Paso 592,777 MMBtus of natural gas, less as an

adjustment of 12,362 MMBtus for overcharged shrinkage, making the outstanding imbalance 580,415 MMBtus.

The undersigned United States Magistrate Judge recommends that summary judgment be GRANTED in El Paso's favor and against Windward and Perry on the issue of a natrual gas imbalance owed to El Paso by Windward/Golden of 580,415 MMBtus [Dkt. 220]. Windward and Perry may satisfy the judgment either with natrual gas in the amount of the imbalance, or the equivalent value in money.

IX. THE LIQUIDS IN KIND AGREEMENT

On August 16, 1989, El Paso and Windward entered into what is known as the Liquids in Kind ("LIK") Agreement. [Dkt. 245, Tab 1]. Before the LIK Agreement, the value of liquid hydrocarbons extracted from the natural gas shipped for Windward was applied as a credit to transportation charges incurred with El Paso. Since the LIK Agreement, Windward no longer receives a credit, but instead receives the liquids extracted, which Windward then markets.

The LIK Agreement provides, in relevant part:

> 3. The liquids extracted from Windward's gas in any month will be made available to Windward . . . during the following month.
>
> * * *
>
> 4. The quantities of liquids available for in-kind receipt shall be determined for each product, based on the volume of gas transported for Windward each month from each well, the chromatographic analysis for that well used to determine test gallons, and the actual liquids allocated to that well for that month. All imbalances will be accounted for product by product.

Windward[6] seeks summary judgment that El Paso breached the LIK Agreement in two respects: (1) the quantity and composition of natural gas liquids (NGLs) made available to Windward was not based on the chromatographic analysis for each well, as specified in the LIK agreement which resulted in Windward receiving a smaller volume of liquids and liquids of a composition with a lesser value than it was entitled to receive under the contract; and (2) the liquids extracted from Windward's gas were not made available the month following production, again, as specified in the agreement. [Dkt. 230].

El Paso responds that the agreement reflects the parties contemplated imbalances would occur, as paragraph 4 recites: "All imbalances will be accounted for product by product." According to El Paso, the liquids were delivered to Windward the month after production, but due to various reporting mechanisms, El Paso could not know the precise volume of liquids delivered to Windward until a point in the second month after production. El Paso maintains the liquids existed and were delivered in the month after production, but Windward was not advised of the exact volume until the second month following production. In sum, according to El Paso, liquids were delivered the month following production but accounting adjustments were made in subsequent months. This methodology was purportedly explained to Windward in October 1989. And, in January and February of 1990, Windward conducted an audit of El Paso's liquids allocation and delivery procedures and was therefore aware of and tacitly agreed to the procedures.

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[6] *The LIK Agreement is between El Paso and Windward only, not Golden.*

Relying on Windward's long-term acceptance of El Paso's performance, the fact that Windward had conducted an audit, and on Perry's testimony that by February 1990, Windward "knew that El Paso was not allocating the liquids that they were supposed to for our account, pursuant to the agreement" [Dkt. 224, Tab 4, pp. 672-3], El Paso argues that Windward waived its right to enforce the exact terms of the contract.

Concerning the volume and composition of liquids allocated, Windward claims that El Paso did not allocate the liquids according to the chromatographic analysis specified in the agreement, resulting in an imbalance owing to Windward of 4,999,435 gallons of liquids having a value of $1,453,996 for the period of February 1990 through July 1992. [Dkt. 254, p.10, ¶ 18; Dkt. 234, Tab 5]. El Paso acknowledges that at times it suffered operational problems, including a change in computer programming logic, which affected liquids estimates for Windward. However, El Paso maintains the imbalances owed to Windward were made up as soon as the errors were discovered so that by September 1992, after all liquids had been accounted for, Windward owed El Paso liquids of 87,484 gallons at a value of $21,989. [Dkt. 221, p. 6, ¶17; Dkt. 224, Tab 5, ¶¶ 15-16].

Windward seeks summary judgment that El Paso breached the terms of the LIK Agreement. [Dkt. 230]. El Paso seeks summary judgment that it performed according to the terms of the LIK Agreement, or the accepted practice of the parties. [Dkt. 220]. Summary judgment is appropriate when there is not a genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex*, *supra*. Here, based on the materials submitted by the parties, there are material questions of fact precluding summary judgment including: Does the variance in delivery of liquids constitute a breach of the contract, or fall

within the imbalances contemplated by the parties? By accepting El Paso's performance, has Windward waived its right to enforce the specific contractual terms? Has El Paso under allocated liquids so that it owes 4,999,435 gallons to Windward, or has El Paso made up all imbalances so that Windward owes El Paso 87,484 gallons?

The undersigned United States Magistrate Judge recommends that summary judgment on the question of breach of the LIK Agreement be DENIED. [Dkt. 220 & 230].

X. TORTIOUS BREACH OF LIK AGREEMENT

In its Second Amended Counterclaim, filed October 13, 1993 [Dkt. 147], Windward alleges:

> "the conduct of El Paso by some arrangement unknown to the counter plaintiffs, in placing performance of the LIK agreement in the hands of Meridian Companies, constitutes gross recklessness or wanton negligence on the part of a party to an important commercial contract so that El Paso's breach of contract is a tortious breach of contract in wanton disregard of the rights of another, oppression, fraud, or malice, actual or presumed, so that the jury should be allowed to award punitive damages against El Paso."

El Paso seeks judgment that, as a matter of law, Windward cannot establish a claim for tortious breach of the LIK agreement. [Dkt. 220].

The parties disagree over which state's law applies to the LIK Agreement. Oklahoma choice of law principles apply. *Black v. Cabot Petroleum Corp.*, 877 F.2d 822, 823 (10th Cir, 1989). Oklahoma law provides:

> A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law of the place it was made.

15 O.S. § 162. The parties may also choose which law governs a contract. *Pate v. MFA Mut. Ins. Co.*, 649 P.2d 809, 811 (Okla.App. 1982). The possibilities in this case are: (1) New Mexico as the place of performance; (2) Texas, pursuant to the choice of law provisions in the TSAs[7]; or (3) Oklahoma as the place of contracting.

The Oklahoma choice of law provision for contracts in 15 O.S. § 162 has been interpreted to mean that the place of contracting applies only if the contract is silent as to the place of performance. *Panama Processes v. Cities Service Co.*, 796 P.2d 276, 287 (Okla. 1990); *Rhody v. State Farm Mut. Ins. Co.*, 771 F.2d 1416, 1420 (10th Cir. 1985). The LIK Agreement refers to New Mexico in describing performance of the contract:

> This letter agreement sets forth the terms, conditions, and procedures for receipt, in-kind, by Windward Energy & Gas Marketing Co. ("Windward"), of plant liquid hydrocarbons extracted from volumes of natural gas received and transported for Windward's account through the facilities of El Paso Natural Gas Company ("El Paso") in the San Juan Basin area.
>
> 1. El Paso will make Windward's in-kind liquids available, at the interconnection between the liquid products outlet of the New Blanco Plant . . . in San Juan County, New Mexico . . . .

[Dkt. 245, Tab 1]. According to the above-quoted terms of the LIK Agreement, New Mexico is the *only* possible place for performance of the agreement. Therefore, New Mexico law must be applied to the contract issues concerning the LIK Agreement.

Under New Mexico law, punitive damages may not be based solely on a breaching party's "gross negligence" in failing to perform under a contract. *Paiz v. State Farm Fire & Cas. Co.*,

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[7] *Windward/Golden argue that the LIK agreement and the TSAs are integrated contracts, although they do not make that argument in the context of the choice of law question.*

880 P.2d 300, 301 (N.M. 1994). In *Paiz* the New Mexico Supreme Court clarified the law in New Mexico on the question of punitive damages for breach of contract. Quoting from 3 E. Allan Farnsworth, *Farnsworth on Contracts*, §12.8 at 189-90, the Court stated:

> The amount of recovery should not depend on the manner in which the contract was breached, and the non breaching party should not be able to extract an extra bonus from a breach characterized by a high degree of fault or resulting from a low degree of care. "It is a fundamental tenet of the law of contract remedies that, regardless of the character of the breach, an injured party should not be put in a better position than had the contract been performed." [quotations in original, citation omitted].

The *Piaz* Court acknowledged a narrow exception to the general rule by providing punitive damages for conduct that constitutes a "wanton disregard" for the nonbreaching party's rights or "bad faith." In all contracts New Mexico implies a covenant of good faith and fair dealing. The *Piaz* Court carefully explained the limitations of this implied covenant:

> [T]he implied covenant of good faith and fair dealing protects only against bad faith--wrongful and intentional affronts to the other party's rights, or at least affronts where the breaching party is consciously aware of, and proceeds with deliberate disregard for, the potential harm to the other party. [footnote omitted].

Id. at 309-10. The Court specifically noted that "not all intentional breaches of contract may be deemed wrongful so as to give rise to a claim for punitive damages." *Id.* at n.7.

In the present case Windward admits that its claim for breach of the LIK Agreement is for breach of contract, not tort, stating, "[a]llegations of intentional and tortious breach are included to allow for imposition of punitive damages." [Dkt. 254, p.24]. The Court's task in deciding the motion for summary judgment in the context of this punitive damages question is to determine

whether there are disputed facts in the record from which a jury could reasonably conclude that El Paso had a culpable mental state.

In its brief opposing El Paso's motion for summary judgment, Windward restates its allegations with somewhat more particularity than in the second amended counterclaim but does not elucidate the *factual* basis for its allegations. In support of its opposition to summary judgment Windward offers: the affidavit of Mark Perry which quantifies the amount of NGLs Windward believes it is owed by El Paso [Dkt. 234, Tab 53] and, proof that, on one occasion, a third party, Meridian, made adjustments to its own nominations which had the effect of changing the volume of liquids Windward received. Even if uncontested, this evidence does not demonstrate the culpable mental state required by New Mexico law in order to assess punitive damages for breach of contract.

The undersigned United States Magistrate Judge recommends that judgment be GRANTED in El Paso's favor on Windward/Golden's claim for tortious breach of contract. [Dkt. 220].

XI. TRADE SECRETS

Windward/Golden contend that El Paso misappropriated certain trade secrets in collusion with Windward/Golden former employee, Brian Broaddus. Windward/Golden have identified seven alleged trade secrets which El Paso is accused of misappropriating, as follows: (1) a confidential draft antitrust complaint prepared by Windward's lawyers and the detailed business matters set forth therein; (2) information regarding Windward's financial condition between 1989 and June 1992; (3) information regarding Windward's investments; (4) financial information regarding another Windward company, Windward Properties; (5) financial information regarding Windward's condominium in Santa Fe; (6) information regarding internal commercial

communications concerning Windward's acquisition of Golden; and (7) transportation services sought by Windward/Golden on El Paso.

El Paso seeks summary judgment on Windward/Golden's claim that El Paso misappropriated their trade secrets on the basis that: El Paso did not wrongfully appropriate anything from Windward/Golden; there is no evidence establishing that El Paso used the information allegedly appropriated; and the information does not constitute trade secrets. [Dkt. 220]. Windward/Golden maintain: "Windward need not establish use of the secret by El Paso to the detriment of Windward. Mere acquisition of another's trade secrets, through improper means, even without subsequent disclosure or use, will suffice to impose liability upon the offending party for their misappropriation." [Dkt. 254, p. 54].

Windward/Golden's position, is directly contrary to the law of Oklahoma.[8] Oklahoma's Uniform Trade Secrets Act sets forth the elements of a claim for misappropriation of trade secrets, 78 O.S. §§ 85-94. The plaintiff must allege and prove: (1) the existence of a trade secret; (2) an act of misappropriation by defendants; and (3) use of trade secret by defendants (4) to the detriment of the plaintiff. *Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc.*, 584 F.2d 946, 951 (10th Cir. 1978); *Micro Consulting, Inc. v. Zubeldia*, 813 F.Supp. 1514, 1534 (W.D. Okla. 1990) (Plaintiff's failure to prove defendant's wrongful use of defendant's trade secret precluded recovery under Oklahoma Trade Secrets Act).

Leaving aside the question whether any of the information El Paso is alleged to have appropriated constitutes a "trade secret," with the exception of the draft antitrust complaint,

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[8] *The parties agree Oklahoma law governs this claim.*

Windward/Golden have produced no evidence that El Paso used the alleged trade secrets. Since Windward/Golden have not produced evidence related to one of the elements of the claim on which they have the burden of proof, summary judgment is appropriate and it is not necessary to discuss the other elements.

The exception to the foregoing is the draft antitrust complaint. One of the trade secrets El Paso is alleged to have procured is a draft of an antitrust complaint. According to allegations in Windward/Golden's Second Amended Counterclaim [Dkt.147, ¶¶ 164-174] a draft complaint was procured by a Windward/Golden employee and forwarded to Brian Broaddus, a former employee of both Windward/Golden and El Paso. Following some telephone discussions with an El Paso employee, Broaddus forwarded the draft complaint via an overnight courier to a third party who then placed it in El Paso's possession. Windward/Golden allege that, as a result, El Paso preemptively filed the instant action seeking declaratory judgment that its actions were not violative of federal antitrust laws.

The Court acknowledges that the circumstances of El Paso's having received a draft of Windward's antitrust complaint are suspicious. However, the Court has determined that the draft antitrust complaint does not meet the statutory definition of trade secret. The Act defines a trade secret as follows:

> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process, that:
>
> > a. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

b. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Proving the existence of a trade secret thus requires proof of (1) information not generally known in the industry (2) which gives rise to a competitive advantage to the owner of such information and (3) which is maintained as a secret. *Micro Consulting*, 813 F.Supp. at 1534. Despite the fact that 40 states have adopted the Uniform Trade Secrets Act, neither of the parties cited any cases dealing with draft court pleadings as "trade secrets," nor has the Court discovered any in its own research.

The information contained in the draft complaint was eventually publicly disclosed by Windward/Golden in both a filing in the United States District Court in New Mexico and in the counterclaims which Senior Judge Ellison dismissed in the instant action, thus the information is not secret. Further, Oklahoma law requires that the information wrongly obtained give rise to a *competitive* advantage of the owner. It may be true that El Paso obtained some sort of advantage through its receipt of the draft complaint, but it was not a *competitive* advantage. Litigation is a means of dispute resolution, it is not commerce, or trade. Moreover, the Court has examined the draft complaint [Dkt. 226, Tabs 37 & 38] and finds that it does not contain trade secret information. The Court finds that because the draft antitrust complaint does not meet the requirements of a trade secret, summary judgment for El Paso is appropriate.

The undersigned United States Magistrate Judge recommends El Paso be GRANTED summary judgment on the issue of misappropriation of trade secrets. [Dkt. 220].

XII. INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONSHIPS

The parties agree that Oklahoma law applies to this claim in accordance with the "most significant relationship" test adopted by Oklahoma in *Brickner v. Golden*, 525 P.2d 632 (Okla. 1974). Under Oklahoma law, the elements for the tort of malicious interference with a business relationship or prospective economic advantage are: (1) the existence of a business or contractual right that was interfered with; (2) interference which was malicious and wrongful; (3) interference was neither justified, privileged nor excusable; and (4) damage proximately sustained as a result of the complained interference. *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649, 654 (Okla. 1990).

Windward/Golden assert that El Paso's termination of transportation service was unjustified, that El Paso interfered with their contracts with producers and purchasers, and Windward/Golden suffered damages as a result. El Paso has submitted the deposition testimony of two of Windward/Golden's customers who testified that El Paso did not play any role in influencing their choice of gas marketers. Windward/Golden answer that it was common for their gas purchase agreements with their suppliers to be for three or six month terms and to be renewed on expiration. They point to testimony within their customers' depositions that they had no plans to change marketers before Windward/Golden were suspended and conclude that El Paso's *wrongful* termination of transportation service is the proximate cause of their damages.

The Court has already concluded that El Paso's termination of transportation service for nonpayment of transportation bills was justified. Aside from the bare fact of termination, Windward/Golden have offered no *evidence* of any activity undertaken by El Paso to interfere

with their business relationships. Accordingly, summary judgment in El Paso's favor on this claim is appropriate.

The undersigned United States Magistrate Judge recommends that El Paso be GRANTED summary judgment on Windward/Golden's claim for intentional interference with business relationships. [Dkt. 220].

XIII. CIVIL CONSPIRACY BY EL PASO

Windward/Golden allege that El Paso and Brian Broaddus conspired to destroy their business in the San Juan Basin. According to Windward/Golden:

> El Paso wanted Windward out of business to relieve it of the NGLs misallocation claim, to avoid complications with Windward with respect to FERC proceedings, to avoid allowing Windward the very significant advantages of the Realignment of Business Agreement, and other similar reasons. Broaddus hated Windward's president, was in league with El Paso in concocting an excuse to suspend Windward and wanted to and did take over Windward gas marketing business in the San Juan Basin. [Dkt. 254, p. 59-60].

El Paso seeks summary judgment on the basis that Windward/Golden have failed to prove that El Paso tortiously breached the LIK agreement, tortiously interfered with Windward's business relations, or misappropriated its trade secrets. [Dkt. 220]. El Paso also argues that unless Windward/Golden prevail on these claims, they cannot prevail on their conspiracy claim.

In Oklahoma the definition of a conspiracy is a "combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means.[9] Such a statement of the nature of

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[9] *The parties have cited the laws of various states (New Mexico, New York, Oklahoma, Tennessee, and Texas) in support of their respective positions on the civil conspiracy claim, but they do not discuss choice of law. Because of Oklahoma's significant relationship to this claim, and because Oklahoma law has been applied to two of the three tort claims upon which the conspiracy claim is based, the Court has applied Oklahoma law to the civil conspiracy claim, as well.*

a civil conspiracy presupposes that there can be no conspiracy where the act complained of and the means employed are lawful." *Jurkowski v. Crawley*, 637 P.2d 56, 62 (Okla. 1981) [citations omitted]. In addition, the Oklahoma Supreme Court has determined:

> [I]n order to make out a prima facie case of conspiracy, the evidence must be (1) Clear and convincing and (2) such evidence must Do more than raise suspicion it must Lead to belief. The rules of law set forth above also provide that disconnected circumstances, any of which, or all of which, are just as consistent with lawful purposes as with unlawful purposes, are insufficient to establish a conspiracy. [capitalizations in original].

Dill v. Rader, 583 P.2d 496, 499 (Okla. 1978).

The Court has determined that El Paso's termination of transportation service was justified under the terms of the tariff and that Windward/Golden cannot succeed on their claims of misappropriation of trade secrets, tortious interference with business relations, or tortious breach of the LIK agreement. These determinations fatally affect Windward/Golden's civil conspiracy claim.

The undersigned United States Magistrate Judge recommends that summary judgment be GRANTED in favor of El Paso on Windward/Golden's civil conspiracy claim. [Dkt. 220].

XIV. SUMMARY JUDGMENT FOR MERIDIAN COMPANIES

Windward/Golden have sued several companies referred to collectively as the Meridian Companies. They are: Burlington Resources Inc., Meridian Oil Holding Inc., Meridian Oil Trading Inc., Meridian Oil Hydrocarbons Inc., and Meridian Oil Gathering Inc. In their motion for summary judgment [Dkt. 217], the Meridian Companies raise the point that all Meridian Companies, with the exception of Meridian Oil Hydrocarbons Inc. ("MOHI") should be granted summary judgment because only MOHI deals with natural gas liquids and none of

Windward/Golden's evidence links them in anyway to the allegations lodged by Windward/Golden. Windward/Golden do not dispute this point. The Court finds that since there is no evidence linking any of the Meridian Companies, except MOHI, to Windward/Golden's allegations of conversion and tortious interference with contract, summary judgment is appropriate.

The undersigned United States Magistrate Judge recommends that summary judgment be GRANTED for Burlington Resources Inc., Meridian Oil Holding Inc., Meridian Oil Inc., Meridian Oil Trading Inc., and Meridian Oil Gathering Inc. on Windward/Golden's claims of conversion and tortious interference with contract. [Dkt. 217].

XV. TORTIOUS INTERFERENCE WITH CONTRACT BY MOHI

El Paso transports gas for a number of shippers, only some of whom take liquids in kind. When a shipper does not take liquids in kind, El Paso sells those NGLs to MOHI as El Paso's exclusive broker for liquids not taken by shippers. El Paso directs (nominates) the plant as to the amounts and the composition of NGLs the various recipients are to receive each month. The nominations are to either shippers taking liquids in kind, or to MOHI. Windward claims that El Paso has systematically shorted Windward its NGLs and that MOHI benefited as a result of having more NGLs to broker. Windward points to evidence that in May 1991, unbeknownst to El Paso, MOHI changed nominations, and MOHI received more NGLs than it was entitled to receive, while Windward received less. Windward maintains that this gives rise to its claim that MOHI is guilty of tortious interference with contract (the LIK Agreement) and conversion.

The parties agree that the law of New Mexico should apply to this claim, as New Mexico is the state with the most significant relationship to the conversion claim. *See Brickner v.*

Gooden, 525 P.2d 632, 637 (Okla. 1974). However, the parties do not agree on what the law of New Mexico is.

MOHI, citing *M&M Rental Tools, Inc. v. Milchem, Inc.*, 612 P.2d 241, 246 (N.M. App. 1980), argues that the tort requires "either an improper motive (solely to harm plaintiff), or use of improper means" for liability to attach. Windward argues the *M&M Rental* case is not applicable because it deals with an interference with prospective contractual relations, a situation not present in this case. Windward interprets the language, "improper motive (solely to harm plaintiff) or improper means" to equate to malice. According to the Court in *Bynum v. Bynum*, 531 P.2d 618, 621 (N.M. App. 1975), "malice is not an element of the tort [of wrongfully interfering with contract]." In the same vein as Windward's objection to *M&M Tools*, the Court notes that *Bynum* involved inducing a breach of contract, again a situation not present in this case. The present case involves actions, other than inducements, taken by a third party (MOHI) which allegedly caused a party to the contract (El Paso) to breach it. Neither of the cases upon which the parties rely involve a situation similar to the case at bar. In fact, there are no New Mexico cases dealing with a similar situation. However, the Court is convinced that, faced with the current situation, the New Mexico Courts would apply the following rule:

> To state a claim for tortious interference with existing or prospective contractual relations, plaintiffs must establish that the [defendant] interfered with an improper motive or by improper means or acted without justification or privilege. [citations omitted] [emphasis supplied].

Quintana v. First Interstate Bank of Albuquerque, 737 P.2d 896 (N.M.App. 1987).

The New Mexico Courts have relied on the definitions and comments contained in the Restatement (Second) of Torts §§ 766, 766A, 766B, and 767 in developing New Mexico law concerning claims for tortious interference with contract.[10] In *M&M Rental*, when the Court of Appeals was faced with the "first New Mexico decision involving prospective contract interference" the Court adopted the Restatement (Second) of Torts description of the tort. *Id.*, 612 P.2d at 245. In so doing the Court followed *Proctor v. Waxler*, 503 P.2d 644, 647 (N.M. 1972) where the New Mexico Supreme Court adopted the Restatement of Torts (Second) as the basis for describing liability in slip and fall cases, explaining that the Restatement was "persuasive authority entitled to great weight."

The Restatement (Second) of Torts section applicable to the present case is § 766, which states:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other for the failure of the third person to perform the contract. [emphasis supplied].

In the context of inducing breach and interference with prospective relations cases, New Mexico courts have stated that the "improperly interferes" language of the Restatement means interference accomplished by *improper* motive *solely* to harm the plaintiff or by improper means. *M&M Rental,* 612 P.2d at 246; *Anderson*, 637 P.2d at 841. In *M&M Rental,* the court listed as

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[10] *Wolf v. Perry*, 339 P.2d 679, 681-82 (N.M. 1959); *M&M Rental Tools, Inc., v. Milchem, Inc.*, 612 P.2d 241, 245-247 (N.M.App. 1980); *Anderson v. Dairyland Insurance Company*, 637 P.2d 837, 841(N.M. 1981); *Kelly v. St. Vincent Hosp.*, 692 P.2d 1350, 1356 (N.M. App. 1984); *Quintana v. First Interstate Bank of Albuquerque,* 737 P.2d 896, 898-99 (N.M. App. 1987).

examples of improper means "violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood." 612 P.2d at 246. Although this list is not exhaustive, New Mexico courts will find other means to be improper only where they are "innately wrongful or predatory in character." *Kelly*, 692 P.2d at 1356.

In this case the evidence is that MOHI is El Paso's exclusive broker for NGLs not allocated to in-kind shippers, like Windward. [Dkt. 253, Tab 1, pp. 9, 56]. Windward has submitted evidence suggesting, that on one occasion (May 1991), MOHI changed El Paso's nominations of natural gas liquids and, as a result Windward received a lower volume of liquids than it was entitled to receive. A computer logic error within El Paso's system resulted in misallocation of liquids but MOHI had nothing to do with that error. [Dkt. 253, Tab 1, p. 109]. According to Delores Martinez of El Paso, in May 1991, unbeknownst to El Paso, nominations of NGLs were changed by a Judy Anton of MOHI. The changes did not come to El Paso's attention until two months later, when the actual delivery figures became available. In her experience May 1991 was the first time that occurred. [Dkt. 253, Tab 3, pp. 67-71]. There is no evidence of another such occurrence.

According to the deposition testimony of Bruce Malloy of MOHI, El Paso not MOHI determined the volumes of liquids allocated to shippers and those volumes were not changed by MOHI. MOHI apparently received a report from El Paso which showed the volume of liquids MOHI was to receive for the month. MOHI required some of the products to be sent to Wingate, and some to the Mapco pipeline. To accomplish this, MOHI would send instructions to that effect to El Paso. Malloy normally performed this function. [Dkt. 216, Tab J, pp. 83-86]. However, in May 1991, Mr. Malloy was out of town and Judy Anton who was not accustomed to preparing

MOHI's nominations did so. She had been instructed that MOHI wanted to route all of the ethane and 10% of the propane to Mont Belvieu (a Texas market location, via the Mapco pipeline). At the time she made the changes, Ms. Anton did not take into account the total gallons involved and that MOHI's changes would affect Windward or any other shipper. Ms. Anton testified she did not adjust Windward's nominations, or intend that Windward's nominations be changed. [Dkt. 216, Tab E, pp. 65-70].

Windward also relies on a letter from Conoco to El Paso (dated January 10, 1990, but date stamped January 1991) which Windward maintains demonstrates MOHI has improperly interfered with NGLs flowing to third party shippers. In the letter Conoco explains that it receives third party nominations from El Paso, but the product-by-product composition of those nominations does not match the composition of the stream entering Mapco. Meridian (MOHI) then adjusts the third party nominations based upon the previous imbalance between third party shippers and MOHI and the San Juan stream composition. This caused a problem for Conoco as to which nominations to process because its agreement is with El Paso, not MOHI. The letter makes several suggestions as to how Conoco's problem might be remedied. [Dkt. 234, Tab 54]. There is nothing in the letter implying that MOHI's actions were improper, nor does the letter demonstrate that MOHI received NGLs belonging to Windward, or any other shipper.

The record contains no evidence that MOHI took any action with a motive *solely* to harm Windward, or that MOHI used any means which are innately wrongful or predatory in character,

which are required elements of tortious interference with contract. Summary judgment is therefore proper.[11]

The undersigned United States Magistrate Judge recommends that Meridian Oil Hydrocarbons, Inc. (MOHI) be GRANTED summary judgment on Windward's claim of tortious interference with contract [Dkt. 217] and Windward's motion for partial summary judgment on the same issue be DENIED. [Dkt. 230].

XVI. CONVERSION BY MOHI

The parties agree that New Mexico law is applicable to this claim. An action based on conversion of personal property must be brought within four years. § 37-1-4, N.M.S.A. 1978. Windward's action was brought within that time frame and is not time-barred.

New Mexico defines conversion as:

> [T]he unlawful exercise of dominion and control over personal property belonging to another in exclusion or defiance of the owner's rights, or acts constituting an unauthorized and injurious use of another's property, or a wrongful retention after demand has been made.

Nosker v. Trinity Land Co., 757 P.2d 803, 807-08 (N.M.App. 1988).

In support of its summary judgment motion [Dkt. 217], MOHI argues that there is no evidence that it received Windward's liquids as opposed to any of the other shippers. The Court finds that, based on MOHI's changes to the May 1991 nominations, a jury could come to the conclusion that MOHI converted Windward's liquids, as Windward's liquids nomination was lowered to accommodate MOHI. However, there is evidence of this occurring during only one

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[11] *This disposition obviates the necessity of addressing the Copperweld doctrine.*

month, May 1991. Windward has not produced any evidence of MOHI's hand in adjusting its nominations for any other month. Therefore, although summary judgment is not appropriate, it is appropriate to limit proof on this issue to one month, May 1991.

MOHI also argues that there is no dispute that by September 1991 Windward received its entire allotment of May 1991 liquids and that in August 1991 through October 1991 NGL prices were higher so Windward was not damaged, but helped by MOHI's actions. The restoration of converted property to its owner affects the measure of damages, not the existence of a viable claim. See Restatement (Second) of Torts § 922 (damages on return of converted chattel may be diminished under certain circumstances) and § 927(2)(d) (damages for conversion include compensation for the loss of use not otherwise compensated).

MOHI argues that the *Copperweld* doctrine operates to bar Windward's claims against it because at the time of the alleged conversion MOHI and El Paso were both subsidiaries of the same parent company. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771,104 S.Ct. 2731, 2741, 81 L.Ed.2d 628 (1984) the Supreme Court determined that a parent company and wholly owned subsidiary have such a unity of interest that they are legally incapable of violating Section 1 of the Sherman Act in that they cannot *conspire* with each other to effect an unreasonable restraint of trade. With respect to parent/subsidiary liability for conspiracy, the *Copperweld* Court stated:

> Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousness, but one.

Id. The applicability of *Copperweld* to preclude MOHI's liability for either tortious interference with contract or conversion has been decided by Senior Judge Ellison in his Order dated February

24, 1994. With respect to a motion to dismiss, Senior Judge Ellison "decline[d] to extend *Copperweld* to Windward's state law counterclaims [conversion and tortious interference with contract], and denie[d] Meridian's motion to dismiss." [Dkt. 165, p. 11]. The Court agrees with Senior Judge Ellison's conclusion.

Furthermore, the authorities cited by MOHI in support of its argument that the *Copperweld* doctrine bars MOHI's liability are not persuasive. MOHI cites a number of cases in which the *Copperweld* rationale has been applied to prevent civil conspiracy and tortious interference claims against, not only parent and subsidiary, but also subsidiaries with a common parent, as well. However, MOHI's cases are inapposite because none of them deal with conversion.

The undersigned United States Magistrate Judge recommends that MOHI's Motion for Summary Judgment [Dkt. 217] be GRANTED with respect to all months except May 1991, and DENIED with respect to May 1991 and that Windward's motion for partial summary judgment on this issue be DENIED. [Dkt. 230].

XVII. CONCLUSION

In accordance with the foregoing findings, the undersigned United States Magistrate Judge recommends that the following orders be entered:

(1) Defendants, Windward and Mark A. Perry's, MOTION TO DISMISS AND FOR SUMMARY JUDGMENT [Dkt. 184-1 and 184-2] which seeks dismissal of all claims against Mark A. Perry and dismissal of the declaratory judgment action is DENIED.

(2) Meridian Counterdefendants' MOTION TO DISMISS ALL CLAIMS AGAINST MERIDIAN COUNTERDEFENDANTS FOR LACK OF SUBJECT MATTER JURISDICTION [Dkt. 188] is DENIED.

(3) MERIDIAN COUNTERDEFENDANTS' MOTION FOR SUMMARY JUDGMENT [Dkt. 217]:

> (a) Summary judgment is GRANTED for Burlington Resources Inc., Meridian Oil Holding Inc., Meridian Oil Inc., Meridian Oil

Trading Inc., and Meridian Oil Gathering Inc. on Windward's claims of conversion and tortious interference with contract; all Meridian companies except MOHI are dismissed from this lawsuit.

(b) Meridian Oil Hydrocarbons, Inc. (MOHI) is GRANTED summary judgment on Windward's claim of tortious interference with contract.

(c) Summary judgment is GRANTED to MOHI on the issue of conversion with respect to all months except May 1991, and DENIED with respect to May 1991. The questions of MOHI's liability for conversion during May 1991 and damages therefore are issues for trial.

(4) EL PASO'S MOTION FOR SUMMARY JUDGMENT ON TORT AND CONTRACT CLAIMS [Dkt. 220]:

(a) Summary judgment on the issue of Mark A. Perry's individual liability is GRANTED; Perry is personally liable for the obligations of Windward and Golden to El Paso.

(b) Summary judgment is GRANTED on the issue of Windward/Golden's liability for transportation charges, the amount of damages are to be determined at trial.

(c) Summary judgment is GRANTED in El Paso's favor on the issue of a natural gas imbalance owed to El Paso by Windward/Golden of 580,415 MMBtus.

(d) Summary judgment on the question of El Paso's breach of the LIK Agreement is DENIED. All issues concerning breach of the LIK Agreement are issues for trial.

(e) Summary judgment on the question of El Paso's tortious breach of the LIK Agreement is GRANTED in El Paso's favor.

(f) Summary judgment is GRANTED in El Paso's favor on the issue of misappropriation of trade secrets.

(g) Summary judgment is GRANTED in El Paso's favor on the issue of Windward/Golden's claim for interference with business relationships.

(h) Summary judgment is GRANTED in favor of El Paso on Windward/Golden's civil conspiracy claim.

(5) Windward/Golden's MOTION FOR PARTIAL SUMMARY JUDGMENT [Dkt. 230]:

(a) Summary judgment is DENIED on the question of the existence of a bona fide dispute precluding suspension of transportation service. The Court finds that El Paso's suspension of transportation service was permissible under the terms of the tariff.

(b) Summary judgment is DENIED on the question of El Paso's breach of the LIK Agreement. All issues concerning breach of the LIK Agreement are issues for trial.

(c) Summary judgment is DENIED on the question of whether MOHI's conduct constitutes tortious interference with contract and conversion of Windward's NGLs. MOHI's motion for summary judgment has been granted on the issue of tortious interference with contract, removing that issue from trial entirely. All issues concerning MOHI's conversion of NGLs during May 1991 only are for trial.

(6) Counterplaintiffs, Windward/Golden's MOTION TO DISMISS GOLDEN NATURAL GAS COMPANY AS A COUNTERPLAINTIFF [Dkt. 282] is DENIED.

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this Report. Failure to file objections within the time specified waives the right to appeal from a judgment of the district court based upon the findings and recommendations of the United States Magistrate Judge. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

Dated this 29th day of March, 1996.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN RE: PEBCO PROPERTIES, INC.
TAX I.D. NO. 73-0756342

Debtor/Appellant

vs.

Rafael Irom,

Appellee

and,

Pebco Properties, Inc.,

Appellant,

vs.

The Honorable Stephen J. Covey, U. S. Bankruptcy Judge, Northern District of Oklahoma,

Respondent,

CASE NO. 95-02637-C
CASE NO. Ch: 11

District Court # 96-C-0129-E

ORDER DISMISSING APPEAL

NOW on the date last set out below, the above captioned case comes on before the undersigned Judge pursuant to a Motion to Dismiss this Appeal made by the Appellant and filed of record herein on March 22, 1996.

THE COURT FINDS, after reviewing said Motion to Dismiss, that the issues raised in above captioned appeal have been rendered moot, and that the Motion to Dismiss by the Appellant should be granted.

IT IS THEREFORE ORDERED by the Court that the above captioned appeal to this Court from the Bankruptcy Court for the Northern District of

Oklahoma, be, and is hereby **dismissed.**

Dated: 3/27/96

S/ JAMES O. ELLISON
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARCUS W. ENGLISH,

Plaintiff,

vs.

STANLEY GLANZ, et al.,

Defendants.

No. 93-C-1142-E

JUDGMENT

In accord with the Order granting Defendants' motion for summary judgment, the Court hereby **enters judgment** in favor of all Defendants and against the Plaintiff, Marcus W. English. Plaintiff shall take nothing on his claim. Each side is to pay its respective **attorney fees**.

SO ORDERED THIS 27th day of March, 1996.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARCUS W. ENGLISH,)
)
Plaintiff,)
)
vs.) No. 93-C-1142-E
)
STANLEY GLANZ,)
)
Defendant.)

ORDER

This matter comes before the Court on the motion for summary judgment of Defendant Stanley Glanz. Plaintiff has objected. For the reasons state below, Defendant's motion for summary judgment is GRANTED.

I. BACKGROUND AND PROCEDURAL HISTORY

On December 14, 1991, Plaintiff was booked in the Tulsa City County Jail (TCCJ). On December 16, 1991, prison officials transferred Plaintiff to cell "D-3" on the eighth floor of the TCCJ where he was assaulted by crip gang members shortly thereafter. Plaintiff was transported to the infirmary and then to the medical ward where he remained until January 8, 1992. Following his release from the medical ward, prison officials relocated Plaintiff on at least four occasions but at no time transferred him back to a cell on the eighth floor of the TCCJ. Plaintiff's records contained the following notations:

> "Do not move to Eighth floor. (Threat)," and
> "Got beat up at Co[unty]."

On December 27, 1993, Plaintiff brought this pro se civil

rights action against Sheriff Stanley Glanz and Doctor Stripling. He alleged Defendants permitted a violent atmosphere to exist and flourish at the TCCJ in 1991 and 1992, allowed gang members to assault him on December 16, 1991, forced him to live in constant fear for his safety from January through December of 1992, and denied him medical care. On February 27, 1995, this Court dismissed Plaintiff's claims relating to the December 1991 assault as it was barred by the statute of limitations and granted summary judgment in favor of Doctor Stripling as to Plaintiff's medical care claims.

II. SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. Applied Genetics Int'l., Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990) (citing Gray v. Phillips Petroleum Co., 858 F.2d 610, 613 (10th Cir. 1988). "However, the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." Applied Genetics, 912 F.2d at 1241 (citing Celotex Corp v. Catrett, 477 U.S. 317, 324 (1986)). Although the court cannot resolve material factual disputes at summary judgment based on conflicting affidavits, Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991),

the mere existence of an alleged factual dispute does not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Only material factual disputes preclude summary judgment; immaterial disputes are irrelevant. Hall, 935 F.2d at 1111. Similarly, affidavits must be based on personal knowledge and set forth facts that would be admissible in evidence. Id. Conclusory or self-serving affidavits are not sufficient. Id. If the evidence, viewed in the light most favorable to the non-movant, fails to show that there exists a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. See Anderson, 477 U.S. at 250.

II. ANALYSIS

The treatment a detainee receives in jail and the conditions under which he is confined are subject to constitutional scrutiny under the Fourteenth Amendment. See Bell v. Wolfish, 441 U.S. 520, 535 (1979). A detainee may not be subject to conditions which amount to punishment or otherwise violate the constitution. Id. at 537. Conditions which are intended as punitive or are not reasonably related to a legitimate governmental interest violate a detainee's due process rights. Id. at 538-39.

The Court cannot become involved in the minor details of running the county jail. Daily decisions concerning detainees are best left to those entrusted with their confinement. Only where constitutional abuse is apparent should the Court interfere with the administrative functioning of the jail. It is fundamental that loss of liberty and freedom of choice occur during lawful incarceration. Correction officials cannot accommodate the precise needs of every inmate. Consequently, some level of

discomfort is inherent in any incarceration, and as long as that discomfort does not amount to punishment it does not violate a detainee's constitutional rights.

Plaintiff alleges Glanz violated his constitutional rights by "keep[ing] Plaintiff in a state of fear" from January through December of 1992. He alleges Glanz assigned him to cell "#5," forced him to sleep on a mattress on the floor and witness inmates getting beaten up all around him, and failed to remove Plaintiff's name from the list of inmates who could be transferred to the eighth floor of the TCCJ.

Plaintiff has no constitutional right to be incarcerated in a particular cell or facility, and his transfer to cell #5, allegedly populated by blood gang members, in and of itself, does not implicate a constitutional right of the Plaintiff. See Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976); Moody v. Dagget, 429 U.S. 78, 88 n.9 (1976). Thus, any expectation Plaintiff may have had in being placed in solitary confinement is too insubstantial to rise to the level of due process protection. See Meachum, 427 U.S. at 228; Kincaid v. Duckworth, 689 F.2d 702, 704 (7th Cir. 1982), cert. denied, 461 U.S. 946 (1983); see also Ruark v. Solano, 928 F.2d 947, 949 (10th Cir. 1991) (because an inmate has no right to confinement in a particular institution, "[h]e cannot complain of deprivation of his `right' in violation of due process"). Federal courts do not interfere in classification and placement decisions. Such decisions are entrusted to prison administrators, not to the federal courts. Moody, 429 U.S. at 88 n.9; Meachum, 427 U.S. at 228; Wilkerson v. Maggio, 703 F.2d 909, 911 (5th Cir. 1983).

Plaintiff contends a potentially violent environment existed

at the TCCJ in 1992 and he suffered apprehension and fear as a result of being incarcerated there. Pretrial detainees and inmates have a right to be reasonably protected from threats of violence and attacks by other inmates. See Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981). Deliberate indifference on the part of corrections officials to inmate safety and the probability of violent attacks violates a convicted prisoner's Eighth Amendment rights. Berry v. City of Muskogee, 900 F.2d 1489, 1494-95 (10th Cir. 1990). Under the deliberate indifference standard, "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that [an] inmate[] face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, 114 S.Ct. 1970, 1984 (1994). Detainees retain at least the constitutional protections of convicted prisoners. Bell v. Wolfish, 441 U.S. 520, 545 (1979). Therefore, if an official's conduct amounts to deliberate indifference, a detainee's Fourteenth Amendment Due Process rights would also be violated.

After reviewing the evidence in the light most favorable to the non-moving party, the Court finds that Plaintiff cannot demonstrate that from January through December 1992 he was "incarcerated under conditions posing a substantial risk of serious harm" and that Glanz "knew of and disregard[ed] an excessive risk to [his] health or safety." Farmer, 114 S.Ct. at 1977, 1979. While Plaintiff's name may have remained on the list of inmates for possible transfer to the eighth floor of the TCCJ, prison officials never transferred Plaintiff there. Rather prison officials attempted to accommodate Plaintiff's requests for transfer on at

least four occasions and made every effort to keep Plaintiff away from the cells on the eighth floor of the TCCJ.

None of Plaintiff's complained of conditions of confinement, either alone or in totality, amount to punishment. While prison overcrowding may violate the Constitution where it is so egregious that it endangers the safety of inmates, Plaintiff has failed to show that the crowded condition at the TCCJ caused him any physical injury.[1] Moreover, the Constitution is indifferent as to whether the mattress a detainee sleeps on is on the floor or on a bed absent some aggravating circumstances. See Mann v. Smith, 796 F.2d 79, 85 (5th Cir. 1986); Castillo v. Bowles, 687 F.Supp. 277, 281 (N.D. Tex. 1988).

III. CONCLUSION

Accordingly, Defendant's motion for summary judgment (docket #23) is hereby GRANTED.

SO ORDERED this 21st day of March, 1996.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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[1] 18 U.S.C. § 3626(a)(1) provides as follows:
A Federal court shall not hold prison or jail crowding unconstitutional under the eighth amendment except to the extent that an individual plaintiff inmate proves that the crowding causes the infliction of cruel and unusual punishment of that inmate.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

BETTY S. SCOTT and BILL F. BLAIR,)
)
Plaintiffs,)
)
vs.) Case No. 95-C-964-C
)
GERRY M. GRIGGS and MICHAEL DURHAM,)
)
Defendants.)

ORDER DISMISSING WITHOUT PREJUDICE

COMES ON FOR CONSIDERATION this 28 day of Mar, 1996, Plaintiffs' Motion To Dismiss Without Prejudice and upon due consideration:

IT IS HEREBY ORDERED that this case shall be and is hereby dismissed without prejudice, each party to bear their own costs and attorneys fees.

FURTHER THIS COURT ORDERS NOT.

(Signed) H. Dale Cook

H. DALE COOK
U. S. DISTRICT COURT JUDGE
N. D. OKLAHOMA

759-10.031:lm

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHRIS HUDDLESTON; UNKNOWN SPOUSE OF Chris Huddleston, if any; DEBORAH S. HUDDLESTON aka Deborah Sue Huddleston; UNKNOWN SPOUSE OF Deborah S. Huddleston aka Deborah Sue Huddleston, if any; DONNA J. LUTSKO; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED
MAR 28 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
MAR 29 1996
DATE

Civil Case No. 95 C 850C

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 28 day of March, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, CHRIS D. HUDDLESTON, UNKNOWN SPOUSE OF Chris D. Huddleston, if any; DEBORAH S. HUDDLESTON aka Deborah Sue Huddleston, UNKNOWN SPOUSE OF Deborah S. Huddleston aka Deborah Sue Huddleston, if any, and DONNA J. LUTSKO, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, CHRIS D. HUDDLESTON, was served a copy of Summons and Complaint on October 19, 1995, by Certified Mail.

The Court further finds that the Defendants, UNKNOWN SPOUSE OF Chris D. Huddleston, if any, DEBORAH S. HUDDLESTON aka Deborah Sue Huddleston, UNKNOWN SPOUSE OF Deborah S. Huddleston aka Deborah Sue Huddleston, if any, and DONNA J. LUTSKO, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning November 24, 1995, and continuing through December 29, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, UNKNOWN SPOUSE OF Chris D. Huddleston, DEBORAH S. HUDDLESTON aka Deborah S. Huddleston, UNKNOWN SPOUSE OF Deborah S. Huddleston aka Deborah Sue Huddleston, if any and DONNA J. LUTSKO, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, UNKNOWN SPOUSE OF Chris D. Huddleston, if any, DEBORAH S. HUDDLESTON aka Deborah Sue Huddleston, UNKNOWN SPOUSE OF Deborah S. Huddleston aka Deborah Sue Huddleston, if any, and DONNA J. LUTSKO. The Court conducted an inquiry into the sufficiency of the service by

publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on September 13, 1995; and that the Defendants, UNKNOWN SPOUSE OF Chris D. Huddleston, if any, DEBORAH S. HUDDLESTON aka Deborah Sue Huddleston, UNKNOWN SPOUSE OF Deborah S. Huddleston aka Deborah Sue Huddleston, if any and DONNA J. LUTSKO, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, DEBORAH S. HUDDLESTON, is one and the same person as Deborah Sue Huddleston, and will hereinafter be referred to as "DEBORAH S. HUDDLESTON." The Defendants, CHRIS D. HUDDLESTON and DEBORAH S. HUDDLESTON, were granted a Divorce on June 24, 1991, Case No. FD-90-06258, in the District Court of Tulsa County, Oklahoma.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-nine (29), Block Eleven (11), MAPLEWOOD ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on June 30, 1989, the Defendants, CHRIS D. HUDDLESTON and DEBORAH S. HUDDLESTON, executed and delivered to STATE FEDERAL SAVINGS AND LOAN ASSOCIATION, their mortgage note in the amount of $36,330.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, CHRIS D. HUDDLESTON and DEBORAH S. HUDDLESTON, Husband and Wife, executed and delivered to STATE FEDERAL SAVINGS AND LOAN ASSOCIATION, a mortgage dated June 30, 1989, covering the above-described property. Said mortgage was recorded on July 5, 1989, in Book 5192, Page 2747, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 30, 1989, State Federal Savings and Loan Association, assigned the above-described mortgage note and mortgage to THE FLORIDA GROUP, INC. This Assignment of Mortgage was recorded on August 1, 1989, in Book 5198, Page 813, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 26, 1989, The Florida Group, Inc., assigned the above-described mortgage note and mortgage to Trust America Resources, Inc.

n/k/a TARI, INC. This Assignment of Mortgage was recorded on October 10, 1989, in Book 5212, Page 2164, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 26, 1989, TARI INC., assigned the above-described mortgage note and mortgage to GOVERNMENT NATIONAL MORTGAGE ASSOCIATION. This Assignment of Mortgage was recorded on February 8, 1991, in Book 5303, Page 386, in the records of Tulsa County, Oklahoma. This Assignment was re-recorded on April 5, 1991, in Book 5313, Page 1371, in the records of Tulsa County, Oklahoma, to correct the book and page.

The Court further finds that on January 16, 1991, GOVERNMENT NATIONAL MORTGAGE ASSOCIATION, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on January 25, 1991, in Book 5300, Page 1455, in the records of Tulsa County, Oklahoma. This Assignment was re-recorded on February 8, 1991, in Book 5303, Page 387, in the records of Tulsa County, Oklahoma, to correct the chain of title. This Assignment was re-recorded again on April 5, 1991, in Book 5313, Page 1372, in the records of Tulsa County, Oklahoma, to correct the chain of title.

The Court further finds that on January 1, 1991, the Defendant, CHRIS D. HUDDLESTON, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on January 1, 1992.

The Court further finds that the Defendant, CHRIS D. HUDDLESTON, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, CHRIS D. HUDDLESTON, is indebted to the Plaintiff in the principal sum of $50,103.92, plus interest at the rate of 9.5 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $28.00 which became a lien on the property as of June 26, 1992, a lien in the amount of $18.00 which became a lien on the property as of June 25, 1993, and a lien in the amount of $19.00 which became a lien on the property as of June 23, 1994, plus any accruing costs and interest. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, CHRIS D. HUDDLESTON, UNKNOWN SPOUSE OF Chris D. Huddleston, if any, DEBORAH S. HUDDLESTON, UNKNOWN SPOUSE OF Deborah S. Huddleston, if any and DONNA J. LUTSKO, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, CHRIS D. HUDDLESTON, in the principal sum of $50,103.92, plus interest at the rate of 9.5 percent per annum from March 23, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $65.00, plus accruing costs and interest, for personal property taxes for the years 1991, 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, CHRIS D. HUDDLESTON, UNKNOWN SPOUSE OF Chris D. Huddleston, if any, DEBORAH S. HUDDLESTON, UNKNOWN SPOUSE OF Deborah S. Huddleston, if any, DONNA J. LUTSKO and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, CHRIS D. HUDDLESTON, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern

District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $65.00, plus accruing costs and interest, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and

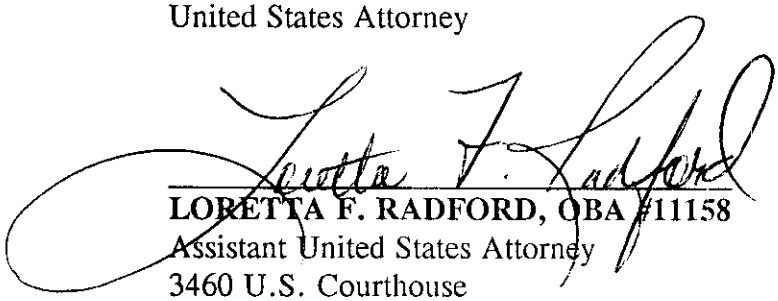
decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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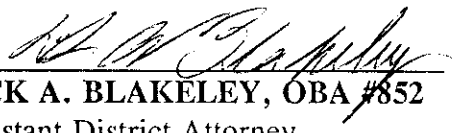

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Judgment of Foreclosure
Civil Action No. 95-C 850C

LFR:flv

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHERYL E. TOLBERT,)
)
Plaintiff,)
)
v.)
) Case No. 94-C-1001-W
SHIRLEY S. CHATER,)
COMMISSIONER OF SOCIAL)
SECURITY,[1])
)
Defendant.)

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge Glen E. Michael ("ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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the meaning of the Social Security Act.[2]

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.[3] He found that claimant had met the disability insured status requirements of the Act on July 10, 1987, the date she became unable to work, and continued to meet them through December 31, 1989. The ALJ stated that the medical evidence established that she had a severe lower back impairment, but had the residual functional capacity to perform the physical exertional and nonexertional requirements of sedentary work, except for lifting more than ten (10) pounds and prolonged standing or walking.

The ALJ found that claimant was a younger individual, 43 years old, had a high

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[2] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[3] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

school education, and did not have any skilled or semi-skilled work skills which were transferable to other work. He concluded that she was unable to perform her past relevant work as a counter person. Even though her nonexertional limitations did not allow her to perform the full range of sedentary work, the ALJ stated that there were a significant number of jobs in the national economy which she could perform, such as teacher's aide, telephone sales person, cab dispatcher, bench assembler, a cashier, and information clerk. Having determined that claimant's impairments did not prevent her from performing certain jobs in the national economy, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) The ALJ erred in failing to consider claimant's mental impairments when assessing her limitations and failing to recognize that she met the requirements of Listings 12.07 and 12.05C.

(2) The ALJ failed to properly consider Dr. Hickman's assessment of claimant's abilities.

(3) The ALJ failed to fulfill his burden of establishing that claimant had the residual functional capacity to perform work that exists in the national economy.

It is well settled that the claimant bears the burden of proving disability that prevents engagement in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant contends she has been unable to work since July 10, 1987 because of back and neck pain (TR 160, 191). She was seen on July 13, 1987 for "lumbar strain" (TR 238-239). Dr. Walter Kempe reported in his notes that she had 90% flexion in her spine on

July 17, 1987, and that she continued to improve through September of 1987 after receiving ultrasound treatments (TR 241-243).

A year later, on October 3, 1988, Dr. Sami Framjee examined claimant concerning her aching lower back (TR 289). He reported that she was "in no distress" and laughed throughout the examination (TR 289). He found no radicular component of a lancinating type, no history of numbness, tingling, or motor weakness in the legs, normal ambulation, no tenderness in the sciatic notches, and near normal range of motion (TR 289). X-rays revealed a normal spine and well-maintained disc spaces with no degenerative changes (TR 290). He concluded she had a "normal examination of the lumbar spine" and no treatment was indicated (TR 290). The doctor stated that she could "return to her normal occupational duties with no restrictions." (TR 290).

On May 8, 1989, Dr. Michael Farrar reported that her back condition was worse (TR 248). Dr. Farrar noted that she had been found 6 percent permanently impaired in her neck in February of 1989 (TR 248). He found that she could only flex forward 40 degrees and to the right and left 15 degrees, resulting in a permanent impairment of 14 per cent to the body as a whole secondary to her cervical spine condition and 10 per cent to the body as a whole secondary to her lumbar spine condition (TR 250). By November 20, 1989, Dr. Farrar reported that she had "a chronic myofascitis with fibrositis" of the spine which was getting progressively worse and that she was disabled from any employment for a minimum of one year (TR 252).

However, on July 11, 1989, Dr. Framjee reported that she had no radicular symptoms, point tenderness, numbness, tingling, or motor weakness (TR 293). He noted

that she made "multiple unnecessary moans and groans when observed" and ambulated with a marked show of gait when observed, but normally when not observed (TR 293). While stating that she could not undergo range of motion studies, she then revealed a forward flexion of 75 degrees (TR 294). X-rays showed a normal spine (TR 294). The doctor concluded that she had no permanent impairment or occupational injury and could return to work (TR 296). Claimant's disability insured status ended on December 31, 1989.

On January 30, 1990, x-rays of claimant's lumbar spine were normal (TR 261). Dr. Richard Felmlee treated her conservatively for "lumbosacral strain" on that date (TR 260). An electromyographic study, conducted on June 21, 1990, showed no acute radiculopathy or neuropathy (TR 271-273).

On June 28, 1990, Dr. J.D. McGovern examined claimant and completed a range of motion chart (TR 274-280). The doctor found that her behavior was not consistent and she made "frequent groans and complaints of pain" whenever she moved below the waist, including hip abduction and ankle flexion which do not usually cause back pain (TR 274-275). He noted that she could not dorsiflex her ankles while lying down, but walked well on her heels, which required dorsiflexion of her ankles (TR 275). All this showed "lack of cooperation." (TR 275). He concluded that muscle spasms could be caused by a voluntary contraction, so it was impossible to get a clearcut objective finding concerning them (TR 275). He concluded by saying "no objective support was found" for her many subjective complaints (TR 276).

On January 3, 1992, Dr. Felmlee examined claimant and her pain was not as severe,

but he suggested she had a somatic dysfunction (TR 333). He saw her several times that month and reported that she was getting progressively better (TR 330-333).

On January 22, 1993, Dr. John Hickman administered the Wechsler Adult Intelligence Scale ("WAIS") to claimant, which showed quotients of 68 for verbal, 67 for performance, and 66 for full scale (TR 345). He concluded she had a "somatoform pain disorder" (TR 344). He observed that she spoke dramatically to make sure her pain was known, with many "sighs and oh's." (TR 345). However, her body posture was relaxed, rather than tense." (TR 345). The doctor found she was histrionic, over-controlled, immature, and inefficient (TR 346). He rated her as fair to poor in related occupational adjustment scales (TR 347-351).

Dr. Michael Karathanos examined her on January 26, 1993 and noted she had "an obvious embellishment of her complaints, sort of . . . walking in a very deliberate and slow way, always moaning and groaning." (TR 352). He determined that she had lumbosacral strain, but it was impossible to determine degree of movement "because of the patient's embellishment of symptoms." (TR 353). Her "marked functional overlay" made it impossible for him to evaluate her residual functional capacity (TR 354-356).

There is no merit to claimant's contention that the ALJ erred by not considering whether she met the Listing of Impairments for somatoform disorders, Listing §12.07,[4]

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[4]Listing 12.07 states:

> **Somatoform Disorders:** Physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms.
>
> The required level of severity for these disorders is met when the requirements in both A and B are satisfied.
>
> A. Medically documented by evidence of one of the following:

found in Appendix 1 to Subpart P of Pt. 404 of the Social Security regulations. There is only one report, Dr. Hickman's, cited by the claimant, which found that claimant has a somatoform disorder. (TR 344). The claimant asks the district court to give great weight to this evidence, but this is beyond the scope of the court's role. Casias v. Secretary of Health & Human Servs., 933 F.2d 799, 800 (10th Cir. 1991). Credibility of the evidence is in the providence of the ALJ. Williams v. Bowen, 844 F.2d 748, 755 (10th Cir. 1988).

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1. A history of multiple physical symptoms of several years duration, beginning before age 30, that have caused the individual to take medicine frequently, see a physician often and alter life patterns significantly; or
2. Persistent nonorganic disturbance of one of the following:
   a. Vision; or
   b. Speech; or
   c. Hearing; or
   d. Use of a limb; or
   e. Movement and its control (e.g., coordination disturbance, psychogenic seizures, akinesia, dyskinesia; or
   f. Sensation (e.g., diminished or heightened).
3. Unrealistic interpretation of physical signs or sensations associated with the preoccupation or belief that one has a serious disease or injury;

AND

B. Resulting in three of the following:
   1. Marked restriction of activities of daily living; or
   2. Marked difficulties in maintaining social functioning; or
   3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or
   4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behavior).

Prior to Dr. Hickman's report, the claimant had not made any claim or offered any specific evidence that she suffered from a somatoform disorder. The ALJ's duty was to weigh Dr. Hickman's report against the totality of the record, and he determined that the claimant did not have a somatoform disorder. (TR 26). The ALJ discussed several findings from Dr. Hickman's report in his decision, but concluded that the doctor's evaluation was not truly representative of her mental status. (TR 19, 21). There was substantial evidence in the other doctors' reports that the ALJ did not err in disregarding Dr. Hickman's finding of a somatoform disorder.

There is also no merit to claimant's contention that the ALJ failed to properly consider the medical evidence of the claimant's Wechsler Adult Intelligence Scale I.Q.-Revised ("WAIS-R") test which demonstrated the claimant meets a §12.05C Listing.[5] Section 12.05C requires that there be a valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment. The ALJ determined on the totality of the evidence that the claimant's WAIS-R scores were not truly representative of her

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[5]Listing 12.05(C) states:

Mental Retardation and Autism: Mental retardation refers to a significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22). (Note: The scores specified below refer to those obtained on the WAIS, and are used only for reference purposes. Scores obtained on other standardized and individually administered tests are acceptable, but the numerical values obtained must indicate a similar level of intellectual functioning.) Autism is a pervasive developmental disorder characterized by social and significant communication deficits originating in the developmental period.

The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.

. . . .

C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing additional and significant work-related limitation of function;

mental status and the "scores are definitely depressed." (TR 21). Dr. Hickman noted that, while the claimant had the lower WAIS-R scores, she had a "Shipley IQ estimate of 81." (TR 344). The facts that she graduated from high school and worked for many years show she is not retarded (TR 24, 90, 181). The ALJ properly relied on the fact that claimant was able to function, could take her children to school, and could care for her personal needs in determining that any restrictions on her daily activities were slight and not related to her "mental status." (TR 21).

The evidence shows that claimant has displayed a history of overstating her problems. Dr. Framjee noted that she made "multiple unnecessary moans and groans when observed. She ambulates with a marked show of gait when observed. Unobserved gait is within normal limits." (TR 293). Dr. Hickman stated in his report that her "[s]peech was hesitant and rather dramatic with her making sure everyone knew she was in great pain with many 'sighs and oh's'.... Meanwhile, body posture was relaxed rather than tense, with no abnormal movements." (TR 345). He described the claimant as "somewhat histrionic." (TR 345). Dr. Karathanos concurred that the claimant "has an obvious embellishment of her complaints, sort of very walking in a very deliberate and slow way, always moaning and groaning." (TR 352).

The ALJ considered the medical reports of all the doctors, including Dr. Hickman's, and the claimant's testimony, and properly determined the claimant lacked credibility and was embellishing to enhance her impairment. (TR 19, 21). It is true, as claimant contends, that Dr. Hickman checked "fair" on a medical assessment form for many categories relating to claimant's occupational, performance, and personal-social adjustments

and, under the decision in Cruse v. U.S. Dept. of Health & Human Servs., 49 F.3d 614 (10th Cir. 1995), this is evidence of disability. However, the weight to be given to a physician's opinion depends, in part, on the extent to which it is consistent with other evidence. Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). There is substantial evidence that the ALJ did not err in examining the entire record and weighing the conflicting evidence, and there is no merit to claimant's second claim that he did not consider Dr. Hickman's assessment.

Finally, there is no merit to claimant's argument that the ALJ failed to fulfill his burden of establishing that claimant had the residual functional capacity to perform work. If the claimant suffers from nonexertional impairments that limit her ability to perform the full range of work in a specific guideline category, the ALJ is required to utilize testimony of a vocational expert. Reed v. Sullivan, 988 F.2d 812, 816 (8th Cir. 1993). "Residual functional capacity" is defined by the regulations as what the claimant can still do despite his or her limitations. Davidson v. Secretary of Health & Human Servs., 912 F.2d 1246, 1253 (10th Cir. 1990). The Secretary has established categories of sedentary, light, medium, heavy, and very heavy work, based on the physical demands of the various kinds of work in the national economy. 20 C.F.R. § 404.1567.

The ALJ relied on a vocational expert ("VE"), A. Glen Marlowe, who answered a hypothetical question that a person with the claimant's personal characteristics and physical limitations could perform several sedentary jobs. (TR 150-152). The vocational expert properly defined sedentary work as lifting a maximum of ten pounds and sitting up to six hours a day and possibly standing two hours a day (TR 149). Such work involves: "lifting

no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." 20 C.F.R. § 404.1567.

The ALJ described a person who had a high school education, could do sedentary work, and was afflicted with chronic lower back pain which was noticeable at all times, so that changing positions was necessary, but it did not interfere with concentration or work assignments. (TR 150). There is substantial evidence in the record that this was an accurate description of claimant. The vocational expert testified that such a person could work as a teachers aide, telephone solicitor, taxi cab dispatcher, bench assembler, cashier, or information clerk (TR 150-152). The ALJ met his burden of establishing that claimant had the residual functional capacity to perform many jobs in the national economy.

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 26th day of March, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:TOLBERT.DOC

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHERYL E. TOLBERT,

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,[1]

Defendant.

Case No: 94-C-1001-W

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed March 27, 1996.

Dated this 28th day of March, 1996.

JOHN LEO WAGNER
UNITE STATES MAGISTRATE JUDGE

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

DANNY BURLESON, RAYMON HALE, LLOYD BROOKS, CLAUDE HOLCOMB, JR., LARRY GLEN, DON HILDEBRAND, ROBERT BURROWS, TERRY BUTTERFIELD, and JUDITH HILDEBRAND,

Plaintiffs,

v.

B. F. GOODRICH COMPANY, THE UNIROYAL GOODRICH TIRE COMPANY, JOHN DOE COMPANY, and NOBLE ROSE, an individual,

Defendants.

Case No. 96-C-236-H

PLAINTIFFS' NOTICE OF DISMISSAL WITH PREJUDICE

The Plaintiffs, through their counsel of record, Joseph P. Lennart of Riggs, Abney, Neal, Turpen, Orbison & Lewis, and pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, hereby file their Notice of Dismissal With Prejudice of this action. Pursuant to Rule 41(a)(1)(i) of the Federal Rules of Civil Procedure, Plaintiffs state that, as of the date of filing this Notice of Dismissal With Prejudice, none of the adverse parties have filed or served an answer or a motion for summary judgment. Plaintiffs hereby dismiss this action in its entirety **with** prejudice to its refiling, and acknowledge that each party is to be and remain responsible for his/her/its own costs and attorneys' fees. The dismissal with prejudice of his action is further confirmed by the signature of each Plaintiff on the attached original Dismissal With Prejudice (Exhibit "A") which was signed while the action was pending in the District Court of Ottawa County, State of Oklahoma.

JOSEPH P. LENNART, ESQ.
Riggs, Abney, Neal, Turpen, Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119
918/587-3161
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that on this 28 day of March, 1996, a true and correct copy of the above and foregoing Notice of Dismissal With Prejudice has been mailed, certified mail, return receipt requested, to:

Victor F. Albert, Esq.
McKinney, Stringer & Webster, P.C.
101 N. Broadway, Suite 800
Oklahoma City, OK 73102
Attorneys for Defendant, B.F. Goodrich Company

JOSEPH P. LENNART, ESQ.

VFA/156385

IN THE DISTRICT COURT OF OTTAWA COUNTY
STATE OF OKLAHOMA

DANNY BURLESON, RAYMON HALE, LLOYD BROOKS, CLAUDE HOLCOMB, JR., LARRY GLEN, DON HILDEBRAND, ROBERT BURROWS, TERRY BUTTERFIELD, and JUDITH HILDEBRAND,

Plaintiffs.

v.

B. F. GOODRICH COMPANY, THE UNIROYAL GOODRICH TIRE COMPANY, JOHN DOE COMPANY, and NOBLE ROSE, an individual,

Defendants.

Case No. CJ-96-16

DISMISSAL WITH PREJUDICE

Plaintiffs hereby dismiss this case in its entirety, with prejudice to its refiling, with each party to be and remain responsible for his/her/its own attorneys' fees, costs and expenses.

DANNY BURLESON, Plaintiff

RAYMON HALE, Plaintiff

LLOYD BROOKS, Plaintiff

CLAUDE HOLCOMB, JR., Plaintiff

EXHIBIT "A"

LARRY GLEN, Plaintiff

DON HILDEBRAND, Plaintiff

ROBERT BURROWS, Plaintiff

TERRY BUTTERFIELD, Plaintiff

JUDITH HILDEBRAND, Plaintiff

RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
918/587-3161

By: _____
JOSEPH P. LENNART, #005371
Attorneys for Plaintiffs

30381-001/VFA/154507

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN FRANCIS ROURKE,)
)
Plaintiff,)
)
vs.)
)
AUDIE W. DAVIS, M.D.,)
)
Defendant.)

Case No. 95-C-411-E

O R D E R

Now before the Court are the Motions of the Defendant Audie W. Davis (hereinafter "Davis") to Dismiss or, alternatively, for Summary Judgment (Docket #2) and of the Plaintiff John Francis Rourke (hereinafter "Rourke") for Summary Judgment (Docket #5) and for Directed Verdict (Docket #9).

UNDISPUTED FACTS

On or about December 19, 1994, Rourke was examined by Dr. Guy D. Baldwin, D.O., (hereinafter "Baldwin") an authorized Federal Aviation Administration (FAA) Medical Examiner, to obtain an FAA Third Class Medical Certificate. On the medical examination form, Baldwin indicated that Rourke had violated 21 U.S.C. §§ 846, 952, 960 and 29 U.S.C. § 7206. Baldwin subsequently forwarded the medical examination form to the FAA.

By letter dated January 18, 1995, Davis requested Rourke to forward additional information relating to past criminal convictions and three (3) character references. In this letter, Davis stated that such information was sometimes helpful in determining the existence of behavioral or personality disorders.

By letter dated January 21, 1995, Rourke acknowledged receipt

of Davis' letter and indicated that the information requested by Davis was protected under the Privacy Act and under Fed. R. Crim. P. 11 as being beyond the five year statute of limitations. Rourke also requested that Davis cite the authority which permitted Davis to request such information.

In a subsequent letter dated April 10, 1995, Rourke acknowledged receipt of part of his medical records from the FAA. Rourke also stated that he had not received any valid reason why his certificate had not been issued. Rourke then cited various statutory and administrative authorities in support of his allegation that the FAA was unlawfully withholding his medical certificate. Rourke also stated that the FAA was required to give him notice of the appealability of the FAA's action and to whom any such appeal should be directed. Apparently, the FAA did not advise Rourke of the requirements for an appeal.

By letter dated April 27, 1995, Davis advised Rourke that the FAA was unable to act upon his request for a medical certificate until Rourke provided the information requested. Further, Davis advised Rourke that the FAA was unable to obtain the information and that it was Rourke's responsibility to provide it under 14 C.F.R. § 67.31.

Subsequently, Rourke, *pro se*, filed his complaint on May 8, 1995, seeking a Writ of Mandamus to compel Davis to issue Rourke a medical certificate. Davis filed a Motion to Dismiss, claiming this Court lacks subject matter jurisdiction and the parties filed Cross Motions for Summary Judgment on the merits of Rourke's claim.

LEGAL ANALYSIS

Jurisdiction

49 U.S.C. § 40113(a), grants the Administrator of the FAA a broad range of authority to execute his duties. Pursuant to this authority, under 49 U.S.C. § 44702(a), the Administrator's duties include the issuance of Airman Certificates. 49 U.S.C. § 44703(a) provides that:

> The Administrator of the Federal Aviation Administration shall issue an airman certificate to an individual when the Administrator finds, after investigation, that the individual is qualified for, and physically able to perform the duties related to, the position to be authorized by the certificate.

However, under 49 U.S.C. § 44702, the Administrator may delegate that duty. The Administrator has delegated that duty to the Federal Air Surgeon and the authorized representatives of the Federal Air Surgeon under the authority of 14 C.F.R. § 67.25.[1]

49 U.S.C. § 44703(c) provides the procedure for appealing the denial of an Airman's Certificate to the National Transportation Safety Board (NTSB). 49 U.S.C. § 1133(1) also states that the NTSB is the proper forum for the appeal of the denial of an Airman's Certificate. The proper step in the appeals process after a hearing before the NTSB is to the appellate courts under 49 U.S.C. § 1153(a).

---

[1] The Defendant claims that the Manager of the Aeromedical Certification Division (the position held by Davis) is an authorized representative of the Federal Air Surgeon.

Thus, although it appears that Rourke, may have some justification for his complaint, his argument cannot be heard in this court. Defendant, Davis, quite properly, claims that the appropriate forum, within the courts, is the appellate courts. However, Rourke must exhaust his administrative remedies before seeking judicial review. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). The statute provides the proper route for Rourke to follow: first to the NTSB and then to the appellate courts.

WHEREFORE, the court GRANTS Defendant's Motion to Dismiss for lack of subject matter jurisdiction (Docket #2) and DENIES all other motions currently before the court in this matter (Docket #'s 5 and 9).

IT IS SO ORDERED THIS 28th DAY OF MARCH, 1996.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOLLAR SYSTEMS, INC.,

Plaintiff,

vs.

No. 95-C-691-E

APCO ENTERPRISES, INC. AND EDWARD J. PETERS,

Defendants and Third-Party Plaintiffs,

vs.

CHRYSLER CORPORATION, PENTASTAR TRANSPORTATION GROUP, INC., and THRIFTY RENT-A-CAR SYSTEM, INC.,

Third-Party Defendants.

O R D E R

Before the Court are the Motion to Dismiss Third-Party Claims (Docket No. 19) filed by the Third-Party Defendants, Chrysler Corporation ("Chrysler"), Pentastar Transportation Group, Inc, ("Pentastar"), and Thrifty Rent-A-Car Systems, Inc. ("Thrifty") and the Motion to Dismiss and Motion for More and Definite Statement (Docket No. 22) filed by Plaintiff Dollar Systems, Inc. ("Dollar").

The Defendants, APCO Enterprises, Inc. ("APCO") and Edward J. Peters, amended their answer to allege the following counterclaims: Dollar violated Section 1 of the Sherman Act, 15 U.S.C. § 1, and breached its licensing agreement with APCO. APCO's amended answer further alleges that the Third-Party Defendants also violated Section 1 of the Sherman Act.

At a status conference held March 22, 1996, counsel for all parties agreed that Defendants' counterclaim under Section 1 of the Sherman Act is controlled by the United States Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The *Copperweld* decision indicates that under § 1 of the Sherman Act, the activities of a wholly-owned subsidiary are not viewed as separate from those of its parent. *Id.* at 771. The parties also agreed that under the law the Third-Party Defendants and Plaintiff constitute a single enterprise as Plaintiff, Pentastar and Thrifty are wholly owned by Chrysler. Therefore, Defendants cannot state a claim under Section 1 under the Sherman Act against Dollar or the Third-Party Defendants.

Based on the above, the Court grants Third-Party Defendants' Motion in its entirety (Docket No. 19). The Court grants Dollar's Motion for the dismissal of Defendants' antitrust claim, but denies its Motion as it relates to the breach of the licensing agreement (Docket No. 22).

ORDERED this 21st day of March ~~27~~, 1996.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 3-28-96

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TOM D. CARDWELL; NOLA E. CARDWELL; CITY OF BIXBY, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

MAR 27 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Civil Case No. 95 C 1042H

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of March 27, 1996 and the declaration of Loretta F. Radford, Assistant United States Attorney, that the Defendants, **Tom D. Cardwell and Nola E. Cardwell**, against whom judgment for affirmative relief is sought in this action have failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendants.

Dated at Tulsa, Oklahoma, this 27 day of March, 1996.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By L Adamski
Deputy

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 95-C-443-K**
	)	
FOX RUN APARTMENTS, LORRAINE DRAKE, CHRISTINA BROWN, SPRADLIN & ASSOCIATES, INC., NORTHCORP REALTY ADVISORS, INC.,	)	
	)	
Defendants.	)	

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, **United States of America**, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendant, **Northcorp Realty Advisors, Inc.**, represented by legal counsel J. Patrick Cremin, pursuant to Fed. R. Civ. P. 41(a)(1) hereby stipulate to the dismissal of this civil action with prejudice as between these parties.

UNITED STATES OF AMERICA

STEPHEN C. LEWIS
United States Attorney

PETER BERNHARDT, OBA #741
Assistant United States Attorney
3460 U.S. Courthouse
333 West Fourth Street
Tulsa, Oklahoma 74103-3809
(918) 581-7463

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

J. PATRICK CREMIN, OBA #2013
320 S. Boston Ave., Suite 400
Tulsa, Oklahoma 74103-3708
(918) 594-0400

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
DAVID WAYNE STARKEY	)	
SSN 440-70-0046	)	NO. 95-C-428-K
d/b/a Green Acres Exotics,	)	
Debtor	)	

ORDER

Debtor initiated this action by filing a NOTICE OF APPEAL TO THE DISTRICT COURT [Dkt.1] together with a document entitled "EXTREME EMERGENCY MOTION TO DISMISS APPEAL TO THE DISTRICT COURT" [Dkt. 2]. Debtor seeks review of an order of the Bankruptcy Court denying his motion to dismiss the bankruptcy.

It is well settled that a federal court must dismiss a case for lack of subject matter jurisdiction, even when the parties fail to raise the issue. *Mansfield, Coldwater & Lake Michigan Railway v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884). District court jurisdiction over bankruptcy appeals is found at 28 U.S.C.§ 158 which provides:

> The district courts of the United States shall have jurisdiction to hear appeals
>
> (1) from final judgments, orders, and decrees;
>
> (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 if such title; and
>
> (3) with leave of the court, from other interlocutory orders and decrees;
>
> and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. . . . [emphasis supplied].

An order is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgement. *In re Durability, Inc.*, 893 F.2d 264, 265 (10th Cir. 1990).

3

The bankruptcy court's denial of Debtor's motion to dismiss is not a final order.

An interlocutory order is appealable under § 158 only upon leave of the district court. *In re Blinder Robinson & Co. Inc.*, 135 B.R. 899, 900-901 (D.Colo 1992). The court notes that the Debtor did not seek leave of court to file the instant appeal. However, under Bankruptcy Rule 8003(c) the Court considers the notice of appeal as a motion for leave to appeal.

Direct appeal from an interlocutory order of the bankruptcy court is appropriate only when the order involves a controlling question of law over which there is a substantial basis for disagreement and for which immediate appeal will advance the ultimate termination of the litigation. *Blinder Robinson*, 135 B.R. at 901. The Court has reviewed the Bankruptcy Court's ORDER DENYING MOTION TO DISMISS attached to the Notice of Appeal and has determined that it does not address a controlling question of law, nor will an immediate appeal advance the ultimate termination of the litigation. Accordingly, the order does not qualify for immediate appeal.

Since the order appealed from is not a final order and does not qualify as an appealable interlocutory order, under 28 U.S.C. § 158 this Court lacks jurisdiction to entertain the appeal. It must therefore be dismissed.

Debtor's appeal is DISMISSED.

SO ORDERED this 22 day of March, 1995.

Terry C. Kern
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAUL SMITH,)
)
Plaintiff,)
)
vs.) No. 96-CV-31-K
)
SATAYABAMA JOHNSON, et al.,)
)
Defendants.)

ORDER

Before the Court is Defendants' motion to dismiss for insufficient service of process, filed on February 13, 1996. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.[1] Accordingly, the motion to dismiss for insufficient service of process (docket #4) is GRANTED and Wexford Medical Service is hereby DISMISSED without prejudice.

SO ORDERED THIS 22 day of March, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

---

[1]Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEDEL MCMURTRY — PLAINTIFF

vs. — Case No. 96-C-0119K

AIR PRODUCTS AND CHEMICALS, INC. — DEFENDANT

VOLUNTARY STIPULATION OF DISMISSAL

COMES NOW the Plaintiff, Ledel McMurtry, by and through his attorneys John S. Knowles, III, and Tom R. Stephenson, and files this his Stipulation of Dismissal without Prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1). No answer or motion for Summary Judgment has been filed as of the date of this pleading.

This the 21st day of March, 1996.

John S. Knowles, III
BRANTLEY & KNOWLES
Post Office Drawer 7985
Jackson, MS 39284-7985
(601) 352-1091
MSB#4228
One of the Attorneys for
Plaintiff

CERTIFICATE OF SERVICE

I, John S. Knowles, III, do hereby certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing Voluntary Stipulation of Dismissal to:

Tom R. Stephenson, Esquire
Stephenson & Webber
Post Office Box 699
Watonga, Oklahoma 73772

S. Brent Bahner, Esquire
Fischl, Culp, McMillin,
Cahffin & Bahner
Post Office Box 1766
Ardmore, Oklahoma 73402

SO CERTIFIED, this the 21st day of March, 1996.

John S. Knowles, III

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHNNY W. KOEPP,)
)
Petitioner,)
)
vs.) No. 95-C-1223-B
)
RITA MAXWELL,)
)
Respondent.)

ORDER

This matter comes before the Court on Respondent's motion to dismiss this habeas corpus action for failure to exhaust state remedies, filed on January 16, 1996. (Doc. #4.) Petitioner, a pro se litigant, has not responded.[1]

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion

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[1] On February 7, 1996, the Court directed Respondent to mail Petitioner a second copy of the motion to dismiss at his new address and sua sponte granted Plaintiff until February 26, 1996, to file a response.

requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that Petitioner has not exhausted all the various grounds for relief he has alleged. Moreover, Petitioner's failure to object to Respondent's motion to dismiss constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.

Accordingly, Respondent's motion to dismiss (docket #4) is **granted** and the petition for a writ of habeas corpus is hereby **dismissed without prejudice.**

IT IS SO ORDERED this 25 day of Mar., 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DANNY R. CAMPBELL,)
)
Plaintiff,)
)
vs.) No. 96-C-197-B
)
RON WARD, and LARRY FIELDS,)
)
Defendants.)

ORDER

Before the court is Plaintiff's pro se motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 and civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff's motion for leave to proceed in forma pauperis is granted. Upon review of the complaint and for the reasons set forth below, the Court finds that venue is not proper in this district and that the action should be transferred to the proper district.

The Court may raise sua sponte the issue of venue in the setting of a section 1915 case. See Yellen v. Cooper, 828 F.2d 1471, 1474-76 (10th Cir. 1987) (allowing for dismissal, under 1915(d) on grounds that would be the basis of an affirmative defense); see also Costlow v. Weeks, 790 F.2d 1486, 1487-88 (9th Cir. 1986) (allowing dismissal sua sponte for lack of venue before responsive pleading had been filed; issue had not been waived). The applicable venue provision for this action is found under 28 U.S.C. §1391(b) which provides as follows:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in

> which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

There is no applicable law with regard to venue under 42 U.S.C. §1983 which would exempt this case from the general provisions of 28 U.S.C. §1391(b). Coleman v. Crisp, 444 F. Supp. 31 (W.D. Okla. 1977); D'Amico v Treat, 379 F. Supp. 1004 (N.D. Ill. 1974).

Plaintiff bases his complaint on allegations that Defendants denied his request for medical care and neglected to answer his "grievances" during his incarceration at Oklahoma State Penitentiary in McAlester, Oklahoma. According to the complaint, Defendant Ron Ward is a resident of McAlester and Defendant Larry Field is a resident of Oklahoma City. The Court takes judicial notice that the city of McAlester is located within the Eastern District of Oklahoma. 28 U.S.C. § 116. Thus, it is clear that venue is not proper before this Court.

When venue is not proper, the Court may dismiss the action, or if it be in the interest of justice, may transfer the case to the district in which it should have been brought. 28 U.S.C. §1406(a). Due to the fact that Plaintiff's complaint is lengthy and handwritten with numerous attachments, the undersigned finds that it would be in the best interest of justice and judicial efficiency to transfer the case to the proper district.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Plaintiff's motion for leave to proceed in forma pauperis (doc. #2) is **granted**; and

(2) This matter is **transferred** to the United States District

Court for the Eastern District of Oklahoma.

IT IS SO ORDERED this 25 day of Mar, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ZYDOT UNLIMITED, INCORPORATED,

Plaintiff,

v.

ONE STOP, INC.,

Defendant.

Case No. 95-C-789-B

O R D E R

This matter comes on for consideration of pleading # 17 which is entitled DEFENDANT ONE STOP'S MOTION TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTY AND FOR WANT OF JURISDICTION, WITH COMBINED BRIEF AND ALTERNATIVE RESPONSE TO APPLICATION FOR INJUNCTIVE RELIEF AND ANSWER TO COUNT I AND MOTION TO DISMISS COUNT II WITH COMBINED BRIEF. (docket # 17).

Defendant has included too many matters into a single pleading. Defendant's motion to dismiss the entire matter on the ground of failure to include an indispensable party will be considered infra. Defendant's response to application for injunctive relief is noted as is Defendant's answer to Count I. Defendant's motion to dismiss Count II, on the ground that it fails to state a claim upon which relief can be granted, is herewith DENIED.[1] Defendant's counterclaim claim is duly noted.

[1] The Court notes Defendant has offered no argument nor authority for this motion which in fact is entitled ANSWER TO COUNT II in the body of the pleading.

The Court will now consider Plaintiff's motion to dismiss the entire case for failure to join an indispensable party and for want of jurisdiction.

In its pleadings Plaintiff Zydot Unlimited, Incorporated (Zydot) alleged it had developed a carbohydrate detoxification product designed to help temporarily cleanse toxins from one's systems; that this product, commercially sold under the name "Ultimate Blend", was developed by Dan Ashlock; that Zydot hired Thomas Burke as a sales and marketing director who allegedly stole substantial quantities of the product; that in 1993 and 1994, in a scheme to build personal customer loyalty and develop an extensive account network, Burke gave rather than sold large quantities of "Ultimate Blend" to customers; that Burke was ultimately fired; that Burke returned 15 shares of Zydot to Plaintiff under the terms of a Stock Sale Agreement, which also contained certain agreements by Burke to protect information and not contact Zydot's accounts or business associates.

Plaintiff further alleged that Burke joined with Defendant One Stop, Inc. to produce the same product[2] as Zydot under the name "Terminader Gold 60"; that One Stop, through Burke, has stolen and utilized misappropriated trade secrets, formula and account information of the Plaintiff, Zydot. Plaintiff failed to state how recently such alleged acts occurred.

Plaintiff also alleged the entire stock of Zydot is owned by

---

[2] Plaintiff alleges it was the same product, thinly disguised by the addition of certain herbs.

its founders, Dan Ashlock, of Beggs, OK, and Tom Morris, of Tulsa, OK.

Defendant has moved to dismiss on the ground that Plaintiff did not join a nondiverse party (Thomas Burke) whom Defendant characterizes as indispensable. Plaintiff responds that Defendant has failed to offer admissible evidence in support of its threshold arguments as required by Fed.R.Civ.P. 19(a), and offers no argument, analysis or evidence demonstrating why the Court should override the presumption against dismissal present in the "equity and good conscience" test of Fed.R.Civ.P. 19(b).

To begin with the party asserting indispensability must prove that the nonparty fits one of the categories set forth in Fed.R.Civ.P.19(a). To meet the criteria of 19(a) the party asserting indispensability must prove: (1) that the absence of a nonparty makes it impossible to accord complete relief among those already present; or (2) a nonparty claims an interest relating to the subject of the action. If the nonparty qualifies under the latter, the party asserting indispensability must then prove one of two additional things: (1) that the nonparty's absence exposes or impedes his ability to protect his interest; or (2) the nonparty's absence places one of the parties already present to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his interest. Nevada Eighty-Eight, Inc. v. Title Ins. Co. of Minnesota, 753 F.Supp. 1516 (D.Nev.1990); F.D.I.C. v. Beall, 677 F.Supp. 279 (M.D.Pa.1987); Nations v. Nations, 670 F.Supp. 1432 (W.D.Ark.1987); Sierra Club v. Watt, 608

F.Supp. 305 (E.D.Cal.1984).

The burden of proof on a Fed.R.Civ.P. 19(b) motion falls on the party asserting indispensability. Nevada Eighty-Eight, Beall, Nations, and Sierra Club, supra.

Defendant has failed to offer proof that the absence of nonparty Burke makes it impossible to accord complete relief among those already present, thereby failing to satisfy 19(a)(1). Further, Plaintiff argues, and the Court agrees, that complete relief between Zydot and One Stop requires the joinder of no one including Burke. Although Burke may have helped One Stop wrongfully acquire Zydot's trade secrets (if ultimately proven), it is One Stop who is alleged to be required to respond in damages, not Mr. Burke. Plaintiff states, and the Court again agrees, that a judgment against One Stop will provide Zydot with full relief for those actions allegedly committed by One Stop.

The Court concludes 19(a)(2) is also inapplicable because Burke has failed to assert an interest or claim in this matter thereby meriting consideration.

Lastly, the Court concludes the Defendant has failed to establish the tenets of the "equity and good conscience" test, courts being reluctant to terminate a case due to the absence of nondiverse parties unless there has been a reasoned determination that nonjoinder makes just resolution of the action impossible. Jaser v. New York Property Ins. Underwriters Association, 815 F.2d 240 (2nd Cir.1987). Indeed, Defendant has failed to produce any admissible evidence on any of the four factors listed in 19(b)

which a Court must address in reaching a conclusion under the "equity and good conscience" test.

The Court concludes Defendant's motion should be and the same is herewith DENIED.

IT IS SO ORDERED this 25 day of March, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARLAND L. ROBERTSON,

Plaintiff,

v.

Case No. 95-C-1135-B

UNITED STATES,

Defendant.

O R D E R

This matter comes on for consideration of Plaintiff Garland Robertson's Motion for Summary Judgment (Docket #4), and Defendant United States' Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), and alternative Motion for Summary Judgment (Docket #8). On November 14, 1995, Plaintiff filed a complaint alleging violations of the Federal Tort Claims Act ("FTCA"), 28 U.S.C.A. §§ 2671-2680 (West 1994) and the Administrative Procedure Act ("APA"), 5 U.S.C.A. § 701 *et seq.* (West 1994).

Plaintiff, a former chaplain in the United States Air Force, claims that the Air Force wrongfully acted by denying Plaintiff the freedom to exercise religious ministries authorized by military chaplains, and by eliminating Plaintiff from the officer corps of the Air Force. Furthermore, Plaintiff claims that these acts violated his First Amendment rights to free speech and free exercise of religion.

Defendant claims that Plaintiff's FTCA claims should be dismissed for lack of subject matter jurisdiction, pursuant to the

United States Supreme Court's holding in Feres v. United States, 340 U.S. 135 (1950). Furthermore, Defendant claims that Plaintiff's APA claims should be dismissed for lack of subject matter jurisdiction, based on the court's traditional reluctance to intervene and/or review military affairs, particularly those dealing with military discretion.

The record in this case is replete with evidence of ongoing tension and conflict between the two parties. Plaintiff entered the Air Force as a pilot, serving in Viet Nam from May 1969 until 1970. In 1982, he returned to the Air Force as a chaplain. On January 5, 1991, during Operation Desert Shield and while serving as a chaplain, Plaintiff submitted a letter to the editor of a local newspaper questioning the United States' decision to apply military force in the Persian Gulf. Plaintiff signed his name "Garland L. Robertson, Chaplain, Dyess Air Force Base." Plaintiff was reprimanded for this action and was informed that he violated AFR 110-2, because questioning the President's use of force constitutes flouting military authority. (See Exhibit "B" in Defendant's Motion to Dismiss).

From 1991 to 1992, Plaintiff received substandard reviews in Officer Performance Reports (OPR), and received a letter of reprimand for insubordination to the senior chaplain. (See Defendant's Exs. "D", "G" and "H"). As a result of a Robertson's psychological evaluation performed on May 4, 1993, Captain Moore, an Air Force chaplain and psychologist, found that "unfortunately, [Plaintiff] appears to have little insight into the tension points

between military science and ministry . . . his behavior seems to indicate that for him, whatever ministry needs and military needs (specifically, the need to submit to higher ranking authority) are in conflict, ministry must always take priority." (See Defendant's Ex. "K").

On September 16-17, 1993, a Board of Inquiry was convened to consider whether Plaintiff should be discharged from the Air Force pursuant to AFR 36-2. The Board recommended that Plaintiff be separated from the Air Force with an honorable discharge. (See Exhibit "N"). On December 1, 1994, Plaintiff was retired from active duty at the rank of Lieutenant Colonel.

With regard to Plaintiff's claim under the FTCA, the United States Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Feres, 340 U.S. at 146.

In Madsen v. United States, 841 F.2d 1011 (10th Cir. 1987), the Tenth Circuit Court of Appeals was faced with the issue of whether a claim by a military service member under the FTCA was barred by the Feres doctrine. In finding that the facts leading to the complaint in Madsen were "incident to service," the Madsen court noted that "a test for liability that depends on the extent to which particular suits would call into question military discipline and decision-making would itself require judicial inquiry into, and hence intrusion upon, military matters." Id. at 1014 (quoting United States v. Stanley, 107 S.Ct. 3054, 3062 (1987)).

This Court concludes that Plaintiff, in addition to being a member of a religious body, was also a commissioned officer of the Air Force: "Chaplain functions in the Air Force shall be performed by commissioned officers of the Air Force who are qualified under regulations prescribed by the Secretary and who are designated as chaplains." 10 U.S.C.A. § 8067(h) (West Supp. 1995). As an Air Force chaplain, the Plaintiff was subject to the command structure and under the authority of his superiors.

There is no doubt that a lawsuit in this Court would involve questions "of military discipline and decision-making" as discussed in Madsen. Plaintiff's allegations directly involve issues of the Air Force's assessment of Plaintiff's professional and military competence. Pursuant to the Feres doctrine and the Tenth Circuit's interpretation of Feres in Madsen, this Court concludes that subject matter jurisdiction is lacking as to Plaintiff's FTCA claim, and such claim is hereby dismissed.

The Administrative Procedures Act (APA), 5 U.S.C.A. § 701 *et seq.*, states that:

> [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . .

5 U.S.C. § 702.

Traditionally, courts have been reluctant to intervene and/or

review military affairs, particularly those dealing with military discretion. In Parker v. Levy, 417 U.S. 733 (1974), the Supreme Court noted that "[s]peech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected." Id. at 743. In Goldman v. Weinberger, 475 U.S. 503 (1986), the Court held:

> Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the first amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.

Id. at 507. See also Chappell v. Wallace, 462 U.S. 296, 300 (1983).

In Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981), the Tenth Circuit considered "the scope of review federal courts should have in military matters." Id. at 71. The Lindenau court adopted the approach set forth by the Fifth Circuit in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). In order to determine if review of a military decision is proper, the Mindes court first required that there be an alleged violation of a constitutional right. If such a violation was alleged, the court was to weigh the following four factors: "the nature and strength of the challenge to the military determination, the potential injury to the plaintiff if review is refused, the type and degree of anticipated interference with the

military function, and the extent to which military discretion or expertise is involved in the challenged decision." Nesmith v. Fulton, 615 F.2d 196, 201 (5th Cir. 1980) (summarizing the four elements set forth in Mindes).

The Tenth Circuit in Lindenau held that cases "questioning the constitutionality of statutes relating to the military, executive orders, and regulations" are subject to review by federal courts. Id. See also Clark v. Widnall, 51 F.3d 917, 921 (10th Cir. 1995). The Lindenau court then applied the four Mindes factors set, and found that, in light of the last two factors, "the type of interference and the military experience and discretion involved," that "our review would entail a sizeable leap into an area which the only compass is accumulated military experience." Lindenau, 663 F.2d at 74.

As to the instant action, Plaintiff's Complaint alleges a violation of a constitutional right under the First Amendment. Therefore, in order to determine whether review is proper in this Court, the question becomes whether Plaintiff has satisfied the four-part test set forth in Mindes and adopted by the Tenth Circuit in Lindenau.

The last two Mindes factors, namely, the type and degree of the anticipated interference with the military function, and the extent to which military discretion or expertise is involved in the challenged decision, weigh heavily in favor of deferring to the judgment of the Air Force in this situation. As mentioned above, the Supreme Court in Parker and Goldman have indicated that great

deference is to be given to military authorities with regard to areas of particular military interest, including restrictions on "religious motivated conduct" and personnel actions. Goldman, 475 U.S. at 507. Moreover, "[n]ot only are courts `ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have' ... but the military authorities have been charged by the Executive and Legislative branches with carrying out our Nation's military policy." Id. at 507-08.

While subject matter jurisdiction is proper in this Court with regards to Plaintiff's APA claim, the question is whether Plaintiff's claim "presented and the relief sought [is] the type of which admit of judicial resolution." Lindenau, 663 F.2d at 71. Based on the above, this Court concludes that it is not, and that the claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim for which relief can be granted.

In summary, Defendant's Motion to Dismiss for lack of subject matter jurisdiction as to Plaintiff's FTCA claim is GRANTED with prejudice. Defendant's Motion to Dismiss for failure to state a claim as to the APA claim also is GRANTED with prejudice.

IT IS SO ORDERED, this 25th day of March, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

THALYA JOY HELLARD,

Plaintiff,

vs.

AFFILIATED FOOD STORES, INC., an Oklahoma corporation; JAMES LEE PIKE, JR., a minor, and MICHAEL WAYNE PIKE, JR., a minor,

Defendants.

Case No. 95-C-1186-BU

ORDER

This matter comes before the Court upon the Motion for Summary Judgment filed herein by Defendant, Affiliated Food Stores, Inc. The Court file reflects that Plaintiff, Thalya Joy Hellard, and Defendants, James Lee Pike, Jr. and Michael Wayne Pike, have not responded to the motion within the time prescribed by Local Rule 7.1(C). Pursuant to Local Rule 7.1(C), the Court deems the motion confessed.

Having independently reviewed the motion, the Court finds that the motion should be granted.

IT IS THEREFORE ORDERED that

1. Defendant, Affiliated Food Stores, Inc.'s Motion for Summary Judgment (Docket Entry #18) is **GRANTED**;
2. Plaintiff, Thalya Joy Hellard, and each of the Defendants are interpleaded;
3. Defendant, Affiliated Food Stores, Inc. shall be entitled to recover its costs and reasonable attorney's fees from any of the interpleaded funds that the Court determines

belongs to Defendants, James Lee Pike, Jr. and/or Michael Wayne Pike, Jr. Defendant, however, shall not be entitled to recover its costs or reasonable attorney's fees from any of the interpleaded funds that the Court determines belongs to Plaintiff, Thalya Joy Hellard.

4. After the Court determines that any part of interpleaded funds are property of Defendants, James Lee Pike, Jr. and/or Michael Wayne Pike, Jr., and judgment has been entered to that effect, Defendant, Affiliated Food Stores, Inc., shall have fourteen (14) days after service of the Court's order making such determination and judgment thereto in which to file a bill of costs and motion for attorney's fees. The Court Clerk shall not deliver any of the interpleaded funds to Defendants, James Lee Pike, Jr. and/or Michael Wayne Pike until such bill of costs and motion for attorney's fees are decided.

5. Defendant, Affiliated Food Stores, Inc., and the Affiliated Food Stores, Inc. Retirement Plan are discharged from all future liability with respect to the interest of James Patrick Tracy in the Affiliated Food Stores, Inc. Retirement Plan and all claims asserted herein against Defendant, Affiliated Food Stores, Inc., or the Affiliated Food Stores, Inc. Retirement Plan are **DISMISSED WITH PREJUDICE**, with Plaintiff, Thalya Joy Hellard, Defendant, Affiliated Food Stores, Inc., and the Affiliated Food Stores, Inc. Retirement Plan bearing

their own costs and attorney's fees related to those claims.

6. Plaintiff, Thalya Joy Hellard, Defendants, James Lee Pike, Jr. and Michael Wayne Pike, Jr., are permanently enjoined and restrained from commencing or prosecuting any actions arising out of or relating to James Patrick Tracy's interest in the Affiliated Food Stores, Inc. Retirement Plan in any state or federal court against Defendant, Affiliated Food Stores, Inc., the Affiliated Food Stores, Inc. Retirement Plan or any employee, officer or director, agent, attorney, successor, trustee or assignee of either Defendant, Affiliated Food Stores, Inc., or the Affiliated Food Stores, Inc. Retirement Plan.

ENTERED this 22nd day of March, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MELZENIA HAWKINS,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 93-C-570-W

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge ("ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence

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[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.[2]

In the case at bar, the ALJ made his decision at the second step of the sequential evaluation process.[3] After giving due consideration to claimant's credibility, motivation, and the medical evidence, the ALJ concluded that she grossly exaggerated her multiple subjective complaints to include severe pain, and her allegations were not credible. He found that her impairments represented no more than a slight abnormality having such a minimal affect on her that they would not be expected to interfere with her ability to work, irrespective of age, education, or work

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[2]Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[3] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

experience and she did not have a severe impairment. Having determined that claimant's impairments did not prevent her from performing her past relevant work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts that the ALJ did not fully and fairly develop the record, because he did not order either a consultative psychiatric examination or a current physical examination.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant claims she has been unable to work since September 1, 1989, because of hypertension, resulting in dizziness and headaches, and arthritis in her right wrist and knees. (TR 130). She met the disability insured status requirements of the Social Security ACT on that date and continued to meet them through December 31, 1991, but not thereafter. (TR 54).

At a hearing on March 3, 1992, claimant testified that she stopped work in September 1989 because of pain and inability to use the right arm and swelling in her feet and legs. (TR 80). She testified that each morning she was unable to straighten her fingers, had pain and swelling in both wrists, both hands, and both knees, back pain, and knots on her fingers. (TR 85). She stated she had heart problems caused by a heart attack and a stroke and puts Nitroglycerin ointment on her chest daily. (TR 88). She stated her arms "just go limp," causing her to drop things, and she stopped

driving a car. (TR 91). She stated that she blacks out often, but she has not told her doctor this. (TR 86-87). She lives alone and cares for her personal needs. (TR 90). She attends church every Sunday and visits with her children. (TR 141-142). She reads her Bible for two hours every day and listens to the radio and television. (TR 141).

Claimant's treating physician, Dr. Daniel Alexander, saw her ten times from May 26, 1989, through February 24, 1992. (TR 206-210). He saw her once in 1989, eight times in 1990, and twice in 1991 for complaints including headaches, unspecified visual difficulties, pain in her right arm and shoulder, swelling and cramping in her feet, a stiff neck, pain in the right side of her neck into her shoulder, hot flashes, depression, weakness, tightness in her chest, and pain in her entire right side. (TR 206-210).

Dr. Alexander gave multiple diagnoses, including hypertension, arthritis of the lumbar spine, and angina pectoris, and prescribed multiple medications. (TR 206-210). No laboratory data is contained in his treatment notes, and he only reported objective findings concerning claimant's weight and blood pressure. (TR 206-210). Her blood pressure was frequently elevated, but diastolic pressure was never more than 100. (TR 205-210). On April 6, 1990, the doctor stated that his "objective findings" were "elevated blood pressure; weakness of right grip" and his diagnoses was "hypertension; TIA's [transient ischemic attacks]; arthritis of the lumbar spine." (TR 209). He did not state what specific tests confirmed his diagnosis. He stated that claimant had become disabled on September 1, 1989, and estimated she could

resume her regular and customary work on March 30, 1990. (TR 209).

The ALJ noted that the doctor did not see claimant at any time from May 26, 1989, until February 9, 1990, and did not give an explanation for his belief that she had become disabled on September 1, 1989. (TR 48). The ALJ concluded: "[t]here is no evidence in this record to suggest she did." (TR 48).

The ALJ gave special consideration to Dr. Alexander's opinion as claimant's treating doctor, but concluded that the doctor had not furnished any objective findings to support the diagnoses he had given "of transient ischemic attack, arthritis of the lumbar spine, acute arthritis of the right ankle, angina pectoris, hypertensive cardiovascular disease, acute bronchitis and sinusitis. In fact, a review of his treatment notes show claimant never even complained to him of symptoms pertaining to a pulmonary impairment." (TR 48).

Dr. L. Ridgill gave claimant a consultative examination on October 27, 1990. (TR 181-183). Claimant told him she was suffering from hypertension, but did not know what medications she took for it. (TR 181). She also claimed her hypertension had caused numbness in the right sice of her entire body for the past two years, and she had had chest pain for three months three times a week lasting five minutes a time, coming on both with and without exertion and improving with rest. (TR 181). She specifically noted she was not taking any type of medication for chest pain. (TR 181).

Dr. Ridgill did not note her blood pressure, but he completed a physical examination which was entirely normal and showed a full range of motion in all joints

and no evidence of joint stiffness, deformity, heat, or redness. (TR 182-183). Neurological examination was grossly normal, and her memory was intact. (TR 183).

Dr. Ridgill noted that she had a normal gait and was able to ascend and descend from the examination table without any difficulty. (TR 183). X-rays of the right knee showed no evidence of abnormality. (TR 184). The ALJ concluded that this refuted Dr. Alexander's diagnosis some six months later of acute arthritis of the right knee. (TR 49). An electrocardiogram showed normal sinus rhythm with nonspecific ST-T changes. (TR 183).

Dr. Ridgill's diagnosis was hypertension and possible coronary artery disease. (TR 183). He recommended a treadmill stress test to confirm or rule out the diagnosis. (TR 183). The test was scheduled for December 21, 1990, and again on January 8, 1991, but never completed because claimant's blood pressure was elevated on each visit. (TR 144-145). The doctor concluded that claimant had no impairment-related physical limitation. (TR 186-187).

Claimant saw Dr. Alexander for a regular checkup on May 21, 1991 (TR 206), and did not see a doctor again until December 19, 1991, when she saw Dr. Lawrence A. Reed, an internist and surgeon. (TR 195). An electrocardiogram showed ST-T wave abnormality. (TR 195). Blood pressure was 130/70. (TR 195). Claimant told Dr. Reed she was taking medication for hypertension and Pamelar for depression. (TR 195). She reported having chest pain even at rest and facial numbness, and claimed that she fell while standing up. (TR 195). Dr. Reed prescribed medications for her complaints, including Nitro-dur patch, Procardia, Teney and Prozac. (TR 195, 204).

She returned to the doctor on December 23, 1991, when her blood pressure was 127/70, and he discontinued the Nitro-dur patch and started her on Nitroglycerin ointment. (TR 195, 204).

In a letter to claimant's attorney on April 10, 1992, Dr. Reed noted he had not seen the claimant since December 23, 1991. (TR 204). He stated that the electrocardiogram he completed revealed "possible inferior ischemia," and that by history she reported chest pain even at rest. The ALJ found that Dr. Reed never reported any abnormal medical finding and that prescribing multiple medications, including psychotropic medication, based solely on an abnormal electrocardiogram and symptoms, "verges on malpractice." (TR 50).

The ALJ acknowledged that a treating physician's opinion must be given great deference, but may be disregarded "if it is brief, conclusionary, and unsupported by medical evidence." Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987). Specific legitimate reasons for disregarding the opinion must be given by the ALJ. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984). The ALJ then concluded that Dr. Alexander's multiple diagnoses were not supported by any objective medical findings, except elevated blood pressure which was never severely elevated. (TR 50). The ALJ also noted that Dr. Reed recorded no objective evidence of any impairment, including high blood pressure, and the only laboratory data he secured was an electrocardiogram which revealed ST-T wave abnormality. (TR 50). The ALJ found that the doctors' diagnoses therefore had very limited value. (TR 50). He also noted that neither doctor expressed the opinion that claimant was totally disabled. (TR 50).

The ALJ found that there was no evidence that claimant had suffered a heart attack or stroke, as she claimed. (TR 50). He also noted that she had never told a doctor she suffered hallucinations. (TR 50).

The ALJ also discussed claimant's complaints of depression. (TR 51). He noted that claimant complained of depression to her doctors twice and was given anti-depressants by her family physician and an internist. (TR 51). Neither physician reported objective findings to suggest she had any medically determinable mental impairment, nor did they refer her to a mental health treatment specialist. (TR 51).

The ALJ's burden is to prove that, despite medically determinable impairments, claimant can still do relevant work. The statutory language defines disabled in this way: "[a]n individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §1332c(a)(3)(A). The mere recording of a patient's complaint is not a medical determination.

There is no merit to claimant's contention. It is true that the ALJ had the burden to fully and fairly develop the record in this case. Baker v. Bowen, 886 F.2d 289 (10th Cir. 1989). However, while claimant contends the ALJ should have ordered a consultative psychiatric examination, there was no evidence in the record that she had a mental impairment. Based on her objective complaints, she was treated by her treating physicians for depression occasionally, but they never referred

her to a trained psychologist or psychiatrist or recommended psychological tests. Thus her complaints were not supported by any psychological tests. Her activities were not restricted due to a mental impairment, and she had no difficulty with activities of daily living, concentrating, social functioning, or completing tasks in a timely manner. Her family doctor's comments concerning her depression do not show that she has a mental impairment which prevents her from working. See Coleman v. Chater, 58 F.3d 577 (10th Cir. 1995).[4]

The court noted in Landsaw v. Secretary of Health & Human Servs., 803 F.2d 211, 214 (6th Cir. 1986), that: "[t]he burden of providing a complete record, defined as evidence complete and detailed enough to enable the Secretary to make a disability determination, rests with the claimant. 20 C.F.R. § 416.92, 416.913(d). Moreover . . . the regulations do not require an ALJ to refer a claimant to a consultative specialist, but simply grants him the authority to do so if the existing medical sources do not contain sufficient evidence to make a determination."

In addition, claimant was represented at the hearing by counsel who had ample opportunity to come forward with such evidence if he wished. The court in Glenn v. Secretary of Health & Human Servs., 814 F.2d 387, 391 (7th Cir. 1987) said "[w]hen an applicant for social security benefits is represented by counsel the administrative law judge is entitled to assume that the applicant is making his strongest case for

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[4]The court notes that the Tenth Circuit in Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1048 (10th Cir. 1993), concluded that the ALJ must evaluate a claimant's mental impairment if the record contains evidence he has a mental impairment which would prevent him from working.

benefits."

At the hearing on March 3, 1992, claimant's counsel told the court:

> I'd like you to entertain -- I'm sure as you reviewed the file, that the medical evidence in this file is very sketchy, and Ms. Hawkins does have some psychiatric problems that have not been evaluated, and possibly there might be new physical evidence if you entertain a request for a psychiatric exam and physical examination. (TR 76).

Later in the hearing the judge asked: "What I want to do is -- you want to keep this open for a little bit?," and counsel stated: "Well, I'd like to keep it open in order to get the information." (TR 102-103). The judge gave him the ten days he requested to get additional information. (TR 103). The attorney did not arrange for a psychiatric or physical examination or a treadmill test during that period.[5]

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 22nd day of March, 1995.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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[5]Every effort was made by the ALJ and the consultative examiner to develop the record further. Twice claimant was scheduled for a treadmill and could not participate because of high blood pressure. It is likely that a third effort would also be futile given this history and the established fact that she suffers from hypertension.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MELZENIA HAWKINS,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1]

Defendant.

93-C-570-W

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed March 25, 1996.

Dated this 25th day of March, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:judgment

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RANDY D. PRUITT,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1]

Defendant.

94-C-915-W

JUDGMENT

Judgment is entered in favor of the Secretary of Health and Human Services in accordance with this court's Order filed March 25, 1996.

Dated this 25th day of March, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:judgment

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONNA M. CONLY,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1]

Defendant.

93-C-771-W

ORDER

This case is remanded to the agency for further supplementation of the record and for reevaluation of claimant's pain testimony.

Dated this 25th day of March, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:conly.or

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONNA M. CONLY,

Plaintiff,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,[1]

Defendant.

93-C-771-W

JUDGMENT

Judgment is entered in favor of the plaintiff, Donna M. Conly, in accordance with this court's Order filed March 25th, 1996.

Dated this 25th day of March, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

s:conly.jud

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RANDY D. PRUITT,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 94-C-915-W

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge ("ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not

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[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

disabled within the meaning of the Social Security Act.[2]

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.[3] He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for sitting/standing/walking for more than two hours without interruption, occasional lifting of more than seventy pounds, frequent lifting or carrying of objects weighing more than fifty pounds, performing tasks precluded by borderline intellectual functioning, and performing tasks precluded by moderate limitations in maintaining attention and concentration. The ALJ found that claimant's pain and other symptoms

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[2] Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

[3] The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

did not affect his concentration or prevent the performance of medium work with these limitations.

The ALJ concluded that claimant was unable to perform his past relevant work as a tractor/trailer truck driver, peddler, driller helper, grinder, and drill press operator and that his residual functional capacity for the full range of medium work was reduced by the limitations listed above. The ALJ found that claimant was 32 years old, which is defined as a younger individual, and had a limited education, and that transferability of work skills was not material. The ALJ concluded that, although claimant's additional nonexertional limitations did not allow him to perform the full range of medium work, there were a significant number of jobs in the national economy which he could perform, such as kitchen helper and janitor. Having determined that claimant's impairments did not prevent him from performing his past relevant work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

(1) The ALJ failed to fully develop the record with regard to claimant's mental impairments of low intelligence and severe depression.

(2) The ALJ failed to ask the vocational expert a proper hypothetical question which included the claimant's impairments with precision.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

In his application for supplemental social security income, claimant contended he has been unable to work since March 30, 1989, because of a "back injury." (TR 228). In his brief on appeal, he now claims he cannot work because of low intelligence, severe depression, pain, and limited mobility (Docket #9). There is not substantial evidence to support his claims.

Dr. Beau Jennings examined claimant on July 24, 1992, for complaints of back pain and arthritis "all over." (TR 321-322). The doctor reported that his gait was normal in all respects, he used no assistive device to ambulate, and range of motion in all joints and the lumbar spine was full without joint tenderness, swelling, or redness (TR 321-322). His deep tendon reflexes and peripheral pulses were normal, and his calves and thighs measured equal bilaterally (TR 321). A straight leg raising test was negative sitting and supine, and heel/toe gait was normal (TR 321). The doctor made no findings to support claimant's complaints of pain.

Claimant had carpal tunnel release surgery in August of 1992 (TR 324-328) and arthroscopic surgery on his right knee on March 4, 1993 (TR 345-349). There is no evidence of further problems following the surgeries. There is no medical support for claimant's contention that he suffers disabling pain.

At the hearing on October 14, 1993, a medical expert, Dr. Harold Goldman, who is a neurologist, testified after reviewing the medical documents (TR 46-51). He concluded as follows:

> I do not find that he qualifies under a listing. It does not equal a listing and I found no evidence on his medical documents of any diminution of his residual functional capacity and as such he could sit, stand and walk

> for a total of eight hours in an eight hour period. He could bend, stoop, crawl frequently, he could be exposed to unprotected machinery, he could climb, he does have some allergies but there is no medical documents of this so he could be exposed to noxious fumes and to environmental changes. His lifting would be frequently 35 to 50 pounds; occasionally 50 to 75 pounds. He could walk two hours uninterrupted, sit two hours uninterrupted and stand two hours uninterrupted . . . . He could have rapid, alternating movements of his hands and feet; he could push and pull; reach above his head; and that's it.

(TR 49-50).

Dr. B. Todd Graybill conducted a mental evaluation of claimant on February 20, 1990. (TR 191-192). The doctor stated:

> It seemed important to him to look capable and intelligent in the examiner's eyes. He often guessed at answers when he did not know. He was able to laugh easily and seemed to enjoy the testing. He was alert and oriented to date, person, place, and city. He knew that Bush was the current president. He was able to relate recent news. He was able to follow simple directions. He was able to understand what was spoken to him. He was friendly and appropriate in his emotional reaction, though somewhat anxious. He had a good sense of humor. He is somewhat angry about his lack of money and job situation with his former employer. His speech and thinking was rational and coherent, and of a normal rate. There was no indication of hallucinations or delusions. His judgement seemed intact for avoiding physical danger to himself. He was able to read, write, and perform simple arithmetic calculations. (TR 191).

Dr. Graybill found that, on the WAIS-R, claimant made a verbal I.Q. score of 74, a performance I.Q. score of 78, and a full scale I.Q. score of 75, placing him in the borderline mentally retarded range of intellectual functioning. (TR 192). The doctor believed that this testing was a valid representation of intellectual functioning. (TR 192). The I.Q. score placed him at approximately the 5th percentile. (TR 192).

Dr. Graybill concluded:

> He is able to understand, retain, and follow simple instructions. His ability to attend and concentrate is impaired because of his intellectual functioning, but not severely so. He was easy to relate to and would have no problems socially in a work setting. From a psychological point of view, I do believe that he could tolerate the stress and pressure associated with day to day work activity. (TR 192).

Claimant contends that this evaluation could not be relied on by the ALJ because it was more than one year old, but intelligence does not change markedly over time, as certain other physical characteristics do. The ALJ did not err in failing to order another I.Q. test.

At the hearing, claimant testified that he often felt severe depression with suicidal thoughts. (TR 75). He claimed he is angry and hostile and has difficulty getting along with other people. (TR 76). His wife testified that he has poor memory, has trouble understanding things, is depressed and suicidal, cannot cope with anything, and verbally "blows up" often. (TR 82-83). She alleged that he went on a shooting spree in January or February of 1993, which was reported to the police, and they suggested he receive psychiatric treatment. (TR 86).

There is no evidence the claimant sought any treatment for his mental complaints until February 12, 1993, when he was seen at the Grand Lake Mental Health Center for depression. (TR 350). He was seen two or three times a month for the next three months, and his counselor reported as follows:

> No psychological testing or medication clinic services have been rendered to this client by our staff. Our physician has not seen Mr. Pruitt.

> The current diagnosis for Mr. Pruitt is Depressive Disorder Not Otherwise Specified. This means that Mr. Pruitt reports symptoms of depression which are recurrent, but which do not meet the criteria for any specific mood disorder. In my opinion, this appears to be a chronic state for Mr. Pruitt. Psychosocial stressors such as inadequate finances and chronic pain can complicate or exacerbate the depressive symptoms.
>
> Outpatient counseling is currently focused on venting feelings in a healthy manner, identifying appropriate and effective coping techniques, and relaxation training. (TR 350).

There is no merit to claimant's contention that the ALJ failed to develop the record with regard to claimant's depression. It is true that the ALJ had the burden to fully and fairly develop the record in this case. Baker v. Bowen, 886 F.2d 289 (10th Cir. 1989). However, while claimant contends the ALJ should have ordered a consultative psychiatric examination, there was no evidence in the record that he had a mental impairment. Based on his complaints, he was counseled at the mental health center for depression, but no medications were prescribed and psychological tests were not seen to be warranted. He did not even see a staff psychologist or psychiatrist. It was not reported that he had any difficulty with activities of daily living, concentrating, social functioning, or completing tasks in a timely manner. His comments concerning depression are self-serving and cannot be controlling absent other evidence that he has a mental impairment which prevents him from working. See Coleman v. Chater, 58 F.3d 577 (10th Cir. 1995).[4] The ALJ did not err in failing

[4]The court notes that the Tenth Circuit in Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1048 (10th Cir. 1993), concluded that the ALJ must evaluate a claimant's mental impairment if the record contains evidence he has a mental impairment which would prevent him from working.

to order additional psychological testing.

There is also no merit to claimant's second contention. It is true that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a vocational expert, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

At the hearing, the ALJ established that the vocational expert had been present for all of the testimony and studied the record (TR 91). The ALJ's first three hypotheticals did not ask the expert to assume impairments that the ALJ properly deemed unsubstantiated. (TR 64-65). The fourth hypothetical asked the expert to assume that all claimant's testimony and that of his wife was fully credible, and the expert concluded that he would be unable to do any jobs (TR 94-95). This opinion, based on unsubstantiated assumptions, was not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993). It was proper for the ALJ to base his decision on hypothetical questions relating to impairments which were actually supported in the record. Jordan v. Heckler, 835 F.2d 1314, 1316 (10th Cir. 1987).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.

Dated this 22nd day of March, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:pruitt.ord

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

WILSHIRE CREDIT CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 94 CV-940-J
	)	
KENNETH JONES and AMANDA JONES,	)	
	)	
Defendants.	)	

STIPULATION OF DISMISSAL

Plaintiff, Wilshire Credit Corporation, and Defendants, Kenneth Jones and Amanda Jones, hereby stipulate to the dismissal of the above-referenced cause with prejudice as to the refiling of the same.

Scott W. Peck, OBA #11466
105 N. Hudson, Suite 204
Oklahoma City, Oklahoma 73102
(405) 235-2323

Attorney for Plaintiff,
WILSHIRE CREDIT CORPORATION

Brian J. Rayment, OBA #7441
Kivell, Rayment & Francis
7666 E. 61st, Suite 240
Tulsa, Oklahoma 73133
(918) 254-0626

Attorney for Defendants,
KENNETH JONES and AMANDA JONES

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAN E. and AFTON L. TRAVIS,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 94-C-727-H

STIPULATED JUDGMENT

It is hereby stipulated and agreed that plaintiffs Dan E. Travis and Afton L. Travis be granted judgment against Defendant united States of America for the total amount of $4,969.00, consisting of:

Tax Year	1981	1982	1983
Income Tax	$110.00	$464.28	$ 519.00
Interest	170.27	420.22	1,455.00
Substantial Understatement Penalty			1,263.00
Negligence Penalty	90.66	220.16	256.41
TOTAL:	$370.93	$1,104.66	$3,493.41

plus statutory interest, to be calculated pursuant to 26 U.S.C. §§ 6611, 6621, on the sum of $4,845.73 from April 10, 1990, and on the sum of $123.27 from November 4, 1994.

Nanci S. Bramson
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 7238
Ben Franklin Station
Washington, D.C. 20044
(202) 514-0124
Attorney for United States of America

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cm/d
mail

Case No. 94-C-727-H

Jeffrey D. Stoermer, OBA #8652
Jarboe & Stoermer, P.C.
401 S. Boston, Suite 1810
Mid-Continent Tower
Tulsa, OK 74103-4018
(918) 582-6131

ATTORNEY FOR PLAINTIFFS

IT IS SO ORDERED.

DATED_____, 1996.

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	
Plaintiff,	)	
vs.	)	No. 95-C-34-K
VICKIE A. WILLIAMS, et al.,	)	
Defendants.	)	

O R D E R

Before the Court are various motions of the parties. This action commenced January 11, 1995 with the filing of plaintiff's complaint for interpleader. Plaintiff alleged on May 29, 1994 an automobile accident took place on the Turner Turnpike in Creek County, Oklahoma between vehicles driven by Ronald Brett Ruston and Vickie A. Williams. The accident resulted in injuries to the occupants of the vehicle driven by Vickie Williams, namely herself, Verna Maxine Amis, and Samantha Jo McIntosh, a minor, and resulted in the death of Phillip A. Williams, the husband of Vickie Williams.

At the time of the accident, plaintiff had in force a policy which provided liability coverage to Ronald Brett Ruston. The Ruston policy provided liability coverage of $25,000 per person/ $50,000 per accident. Plaintiff also had in force a policy which provided uninsured motorist coverage to Phillip Anthony Williams, Vickie Williams, Verna Maxine Amis and Samantha Jo McIntosh. The Williams policy provided uninsured motorist coverage of $50,000 per person/ $100,000 per accident. There is available under the

policies the total sum of $100,000 subject to the per person limit of $50,000 per person. Plaintiff tendered to the Court the sum of $100,000 in view of defendants' claims under the policies exceeding the maximum amount of coverage available, as well as claims and/or liens of medical providers.

The Williams defendants filed an answer, asserting the total coverage available under the policies was $150,000, as opposed to $100,000. Defendant Secretary of Health and Human Services ("HHS") filed an answer and counterclaim, asserting defendant Verna Maxine Amis was a Medicare beneficiary who was entitled to payment of covered items. The counterclaim seeks reimbursement, pursuant to 42 U.S.C. §1395y(b)(2), for $84,822.89 paid by the Medicare program in behalf of Amis. HHS also asserted a crossclaim against the other defendants, asserting priority of its claim.

Plaintiff filed a motion for summary judgment, asserting its position that the maximum amount of coverage available was $100,000. Initially, defendants contested the motion, but ultimately conceded the point by stipulation. Accordingly, plaintiff's motion is moot.

HHS moved for default on its counterclaim and crossclaim owing to the failure of plaintiff and codefendants to answer. HHS has subsequently moved for summary judgment to which the Williams defendants have responded. The summary judgment motion relies upon the Medicare Secondary Payer (MSP) legislation, which requires Medicare to serve as the secondary payer when a beneficiary has overlapping insurance coverage. 42 U.S.C. §1395y(b). The Williams

defendants do not seriously dispute the MSP legislation provides HHS with (1) an independent right of recovery from the insurer or from a payee of insurance proceeds, 42 U.S.C. §1395y(b)(2)(B)(ii), and (2) a right of supreme subrogation, §1395y(b)(2)(B)(iii). "The language of the statute puts the government in a position superior to all other claimants on [the beneficiary's] share of the pie, but it does not put the government in a position superior to [the beneficiary's] own claim." Waters v. Farmers Texas County Mut. Ins. Co., 9 F.3d 397, 400 (5th Cir.1993).

Essentially, the Williams defendants argue the HHS motion is premature because the Medicare beneficiary, Verna Amis, has not yet been awarded any money for her claim against the interpled funds. HHS concedes the point, to an extent, as follows: "Here, the Secretary's motion merely seeks that the court recognize its priority claim to the Medicare beneficiary's share of the fund (and those health care providers claiming through her). The right to exercise the Secretary's priority claim is deferred until the Medicare beneficiary's share of the fund is determined by the court." (Reply of HHS at 6).

The statutory language being clear, the Court will grant the pending summary judgment motion by recognizing the priority claim of HHS. The issues of (1) whether HHS is entitled to the full amount sought of $84,822.89 and (2) the distribution to the other defendants would seem prime candidates for a settlement conference. If the parties fail to reach agreement, the matter will be set for trial.

It is the Order of the Court that the motion of defendant Secretary of Health and Human Services (#30) is hereby GRANTED to the extent the Court recognizes the Secretary's priority claim to whatever Verna Maxine Amis' share of the interpled funds is. The motion of defendant HHS for clerk to enter default (#16) is declared moot. The motion of plaintiff for discharge of liability (#29) is hereby GRANTED. The motion of plaintiff for summary judgment (#18) is declared moot. If a remaining party desires a settlement conference, a motion of request should be filed.

ORDERED this 21 day of March, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

NELDA CARTER,

Plaintiff,

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY,[1]

Defendant.

Case No. 92-C-351-W

FILED
MAR 21 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE MAR 25 1996

ORDER AND JUDGMENT

The case is remanded to the Secretary for further proceedings to more fully develop the record concerning depression consistent with the Tenth Circuit Court of Appeals' Order and Judgment, attached hereto as Exhibit "A".

Dated this 21st day of March, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:carter.5.1

[1]Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

Wagner

FILED

MAR -7 1996

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

92-C-351-W

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NELDA CARTER,

Plaintiff - Appellant,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,

Defendant - Appellee.

No. 95-5051

A true copy

Teste

Patrick Fisher
Clerk, U. S. Court of
Appeals, Tenth Circuit

By

Deputy Clerk

JUDGMENT
Entered January 9, 1996

Before SEYMOUR, Chief Judge, McKAY, and LUCERO, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of Oklahoma, and was submitted on the briefs at the direction of the court.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded to the United States District Court for the Northern District of Oklahoma for further proceedings in accordance with the opinion of this court.

Entered for the Court

PATRICK FISHER, Clerk

By: Trish Lane, Deputy Clerk

Exhibit A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NELDA CARTER,

Plaintiff-Appellant,

v.

SHIRLEY S. CHATER, Commissioner of Social Security,*

Defendant-Appellee.

No. 95-5051

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 92-C-351-E)

Submitted on the briefs:

Mark E. Buchner, Tulsa, Oklahoma, for Plaintiff-Appellant.

Stephen C. Lewis, United States Attorney, Tulsa, Oklahoma, Joseph B. Liken, Acting Chief Counsel, Region VI, and Linda H. Green, Assistant Regional Counsel, Office of the General Counsel, Dallas, Texas, for Defendant-Appellee.

* Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed. R. App. P. 43(c), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the defendant in this action. Although we have substituted the Commissioner for the Secretary in the caption, in the text we continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

Before SEYMOUR, Chief Judge, McKAY, and LUCERO, Circuit Judges.

MCKAY, Circuit Judge.

Nelda Carter appeals from an order of the district court affirming the Commissioner's decision denying her disability and Supplemental Security Income (SSI) benefits.[1] Ms. Carter filed for disability insurance benefits on July 11, 1990, and for SSI on November 14, 1990, alleging disability due to paraoxysmal atrial tachycardia, a chronic peptic ulcer, gastrointestinal pain, and weakness in her left arm. Her requests were denied initially and on reconsideration. Following a de novo hearing on March 4, 1991, an administrative law judge (ALJ) determined that Ms. Carter was not disabled within the meaning of the Social Security Act and denied benefits. The Appeals Council denied Ms. Carter's request for review and she filed suit in district court. A United States Magistrate Judge affirmed the ALJ's decision, and Ms. Carter appealed to this court.

The Secretary has established a five-step evaluation process pursuant to the Social Security Act for determining whether a claimant is disabled within the meaning of the Act. See Williams v. Bowen, 844 F.2d 748, 750-52 (10th Cir. 1988)(discussing five-step disability test in detail). Here, the

[1] After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f) and 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

ALJ denied benefits at step five. He found that Ms. Carter retained the residual functional capacity to perform sedentary and light work, reduced by her need to work in a less stressful than average environment. He then applied the Medical-Vocational Guidelines, 20 C.F.R. § 404, Subpt. P, App. 2 (the grids) as a framework, considered testimony from a vocational expert, and concluded that Ms. Carter was not disabled.

Ms. Carter argues that the ALJ failed to advise her adequately of her right to counsel. The record reveals, however, that the ALJ did advise Ms. Carter of her right to counsel prior to the hearing, and that she waived that right. Appellant's App., Vol. I at 16. The notice of hearing, notice of denial, and notice of reconsideration sent to Ms. Carter also advised her of her right to representation. Id. at 15, 29, 76. While the customary and better practice would seem to be to place both the advisement and the waiver on the record during the hearing, neither the pertinent statute, see 42 U.S.C. § 406(c), nor the regulations, see 20 C.F.R. § 404.1706, nor our previous cases require any more advisement than was given in this case. See Garcia v. Califano, 625 F.2d 354, 356 (10th Cir. 1980).

Ms. Carter further argues that the ALJ failed to develop fully the record. We agree. "Although a claimant has the burden of providing medical evidence proving disability, the ALJ has a basic duty of inquiry to fully and fairly develop the record as to material issues." Baca v. Department of Health & Human Servs., 5 F.3d 476, 479-80 (10th Cir. 1993)(citations omitted). This duty

is especially strong in the case of an unrepresented claimant. Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992).

Although her applications did not mention depression, the evidence Ms. Carter submitted to the ALJ included an evaluation by Dr. Baum, performed December 6, 1989, in which he diagnosed her as suffering from "depression and associated neuropsychiatric symptoms." Appellant's App., Vol I at 209.[2] The ALJ acknowledged in his decision that Ms. Carter had alleged a "disabling psychiatric condition" of depression. Id. at 23. He rejected Dr. Baum's diagnosis, however, because it was "unsupported by any testing or even a clinical interview . . . ." Id.

The existence of Dr. Baum's diagnosis required the ALJ to develop the record concerning depression. Hill v. Sullivan, 924 F.2d 972, 974-75 (10th Cir. 1991). At the hearing, the ALJ asked Ms. Carter whether she had ever seen a psychiatrist or obtained counseling. Ms. Carter mentioned having consulted Dr. Foley for "job stress" in 1989. Appellant's App., Vol. I at 41. Dr. Baum's report indicated that Ms. Carter had recently been given two weeks of disability as the result of her consultation with Dr. Foley. Id. at 204. The ALJ did not inquire further, request any of

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2 Dr. Baum's evaluation notes psychiatric symptoms, including "[d]ifficulty concentrating, difficulty sleeping, fatigue and lack of energy, depression, anger, crying spells, loss of appetite, difficulty with work, anxiety, and nervousness." Appellant's App., Vol. I at 206.

Dr. Foley's reports or records, or order a consultative examination of Ms. Carter for depression.[3]

An ALJ has the duty to develop the record by obtaining pertinent, available medical records which come to his attention during the course of the hearing. See generally 20 C.F.R. § 404.944; Baker v. Bowen, 886 F.2d 289, 291-92 (10th Cir. 1989). The ALJ's only stated reason for discounting Ms. Carter's diagnosis of depression was that there were no medical tests to support it. However, he made no effort to obtain such tests or to determine what testing Dr. Foley might have performed. We therefore remand for further development of the record concerning Ms. Carter's claims of depression.

Ms. Carter also asserts that the Secretary's decision is unsupported by substantial evidence. We review the Secretary's decision to determine whether the factual findings are supported by substantial evidence in the record viewed as a whole and whether the correct legal standards were applied. Andrade v. Secretary of Health & Human Servs., 985 F.2d 1045, 1047 (10th Cir. 1993). Substantial evidence is "such relevant evidence as a

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3 On appeal, Ms. Carter presents us with records from Dr. Foley's consultations with her in 1989. The records show that he indeed performed psychological tests on her, including the Minnesota Multiphasic Personality Inventory (MMPI), and that the test results indicated depression. Appellant's App., Vol. III at 13. Although Ms. Carter raised the issue of failure to develop the record before the district court, she did not present Dr. Foley's records to the agency or to that court. Normally, we do not consider evidence presented for the first time on appeal. See Selman v. Califano, 619 F.2d 881, 884-85 (10th Cir. 1980). Following this rule, we have not relied on these records in reaching our decision. We note, however, that they do tend to demonstrate that there may have been relevant evidence which the ALJ could have elicited by properly developing the record.

reasonable mind might accept as adequate to support a conclusion." Fowler v. Bowen, 876 F.2d 1451, 1453 (10th Cir. 1989)(quotation omitted).

There is substantial evidence in the record to support the ALJ's findings that the effect of Ms. Carter's alleged paroxysmal atrial tachycardia, her peptic ulcer and the weakness or numbing in her arm, standing alone, did not render her disabled. On remand, however, after further development of the record, the ALJ should give consideration to whether Ms. Carter suffers from an affective disorder, as defined in 20 C.F.R. § 404, Subpt. P, App. 1, § 12.04, or a nonexertional mental impairment. Ms. Carter's mental impairments, if any, must be evaluated in combination with her physical impairments. See Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991). If the ALJ again reaches his decision at step five, he should consider Ms. Carter's mental impairments, if any, in completing the Psychiatric Review Technique form, in evaluating Ms. Carter's residual functional capacity, and in framing a revised, hypothetical question to the vocational expert.

The judgment of the United States District Court for the Northern District of Oklahoma is REVERSED, and this case is REMANDED for further proceedings in accordance with this order and judgment.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
BYRON WHITE UNITED STATES COURTHOUSE
1823 STOUT STREET
DENVER, COLORADO 80257
(303) 844-3157

PATRICK FISHER
CLERK

ELISABETH A. SHUMAKER
CHIEF DEPUTY CLERK

March 4, 1996

Mr. Mark C. McCartt
Chief Deputy Clerk
United States District Court for the N. District of Oklahoma
333 W. Fourth Street
Room 411 United States Courthouse
Tulsa, OK 74103

Re: 95-5051, Carter v. Shalala
Lower docket: 92-C-351-E,

Dear Mr. McCartt:

In accordance with Fed. R. App. P. 41, I enclose a certified copy of the judgment and a copy of the court's opinion, which constitute the mandate in the subject case. By direction of the court, the mandate shall be filed immediately in the records of the trial court or agency.

The clerk will please acknowledge receipt of this mandate by file stamping and returning the enclosed copy of this letter. Any original record will be forwarded to you at a later date.

Please contact this office if you have questions.

Sincerely,

PATRICK FISHER
Clerk

By: _____
Deputy Clerk

PF:tl

cc:
Mark E. Buchner
Peter Bernhardt, Asst. U.S. Attorney
Linda Green

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PHILLIPS PIPE LINE COMPANY,

Plaintiff,

vs.

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY,

Defendant.

Case No. 92-C-315-E

JUDGMENT

In accord with the Order and Judment of the Tenth Circuit, the Court hereby enters judgment in favor of the Defendant, Diamond Shamrock Refining and Marketing Company and against the Plaintiff, Phillips Pipe Line Company. Plaintiff shall take nothing of its claim.

Dated this 22d day of March, 1996.

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JAUN W. ADAMS,

Plaintiff,

vs.

ROBERT H. MACY, et al.,

Defendants.

No. 96-C-195-BU

ORDER

Plaintiff, an inmate at the Tulsa County Jail, has filed a motion for leave to proceed in forma pauperis. The Court now reviews Plaintiff's allegations and concludes that this civil rights action should be dismissed as frivolous.

Plaintiff sues several district judges, prosecutors, and public defenders from Tulsa and Oklahoma Counties for improper enhancement of his sentence and imposing excessive punishment. He alleges that his current sentence has been enhanced "by the prior felony conviction of a John William Rainbolt case no. CF-72-2364 from Oklahoma County" and by a prior felony conviction which was rendered invalid by the provisions of 21 O.S. §51A. Plaintiff seeks actual and punitive damages.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28

U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 504 U.S. 25, 32 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that this action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. Plaintiff cannot seek money damages for the alleged invalidity of his state convictions prior to a determination that the convictions and resulting confinement are invalid. The Supreme Court recently held in Heck v Humphrey, 114 S.Ct. 2364, 2372 (1994), that in order to recover damages in an action brought pursuant to 42 U.S.C. § 1983 for an allegedly unconstitutional conviction or imprisonment, or for "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," a prisoner must show that the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."

In any event, the state district judges and prosecutors are entitled to absolute immunity from this suit. The state district judges are absolutely immune as they acted in their judicial capacity in enhancing Plaintiff's sentence. See Stump v. Sparkman,

435 U.S. 349, 356 (1978); Schepp v. Fremont County, 900 F.2d 1448, 1451 (10th Cir. 1990). Similarly, the state prosecutors are absolutely immune from this action since their request for an enhancement was "intimately associated with the judicial phase of the criminal process." Dicesare v. Stuart, 12 F.3d 973, 977 (10th Cir. 1993) (citing Imbler v. Pactman, 424 U.S. 409, 430 (1976)).

Lastly, Plaintiff cannot maintain a civil rights action against his public defender in either Tulsa or Oklahoma County. "The conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation." Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990) (per curiam); see also See Lemmons v. Law Firm of Morris and Morris, 39 F.3d 264, 266 (10th Cir. 1994). Cf., Tower v. Glover, 467 U.S. 914, 920 (1984) (citing Polk County v. Dodson, 454 U.S. 312, 325 (1981)) (public defender does not act under color of state law when representing an indigent defendant in a state criminal proceeding).

Therefore, Plaintiff's motion for leave to proceed in forma pauperis (docket #2) is GRANTED and the complaint is hereby DISMISSED WITHOUT PREJUDICE under 28 U.S.C. § 1915(d). The Clerk shall MAIL to Plaintiff a copy of the complaint and a habeas corpus package.

IT IS SO ORDERED this 22 day of March, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBORAH ANN HOLLINGSWORTH,

Plaintiff,

vs.

ST. FRANCIS HOSPITAL, INC., and WILLIAM AUGUST PRASSEL,

Defendants.

Case No. 95-C-297-BU

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Michael Burrage, District Judge, presiding, and the issues having been duly tried, and the Court having entered judgment as a matter of law in favor of Defendant, St. Francis Hospital, Inc., pursuant to Rule 50, Fed. R. Civ. P., and the jury having rendered its verdict in favor of Defendant, William August Prassel,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of Defendant, St. Francis Hospital, Inc., and against Plaintiff, Deborah Ann Hollingsworth, that Plaintiff take nothing from Defendant, St. Francis Hospital, Inc., on Plaintiff's claims, and that Defendant, St. Francis Hospital, Inc., recover of Plaintiff, Deborah Ann Hollingsworth, its costs of action.

IT IS FURTHER ORDERED AND ADJUDGED that judgment is entered in favor of Defendant, William August Prassel, and against Plaintiff, Deborah Ann Hollingsworth, that Plaintiff take nothing from Defendant, William August Prassel, on Plaintiff's claim and that Defendant, William August Prassel, recover of Plaintiff, Deborah

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Ann Hollingsworth, his costs of action.

Dated at Tulsa, Oklahoma, this 22nd day of March, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

BRYAN E. ENGLER, Plaintiff,	)	
vs.	)	Case No. 96-C-61-BU
DILLARD DEPARTMENT STORES, INC., Defendant.	)	

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 22nd day of March, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

BRYAN E. ENGLER,	)	
	)	
Plaintiff,	)	
vs.	)	Case No. 96-C-61-BU
	)	
DILLARD DEPARTMENT STORES, INC.,	)	
	)	
Defendant.	)	

ORDER

In light of the parties' settlement and compromise of this matter, the Court **DECLARES MOOT** Plaintiff's Motion to Remand (Docket Entry #3).

ENTERED this 22nd day of March, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 22 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

SUN COMPANY, INC. (R&M), a Delaware corporation, and TEXACO, INC., a Delaware corporation,

Plaintiffs,

vs.

BROWNING-FERRIS, INC., a Delaware corporation, et al.,

Defendants.

No. 94-C-820-K

MAR 25 1996

ORDER

Now before this Court are the Motions by Plaintiffs, Sun Company, Inc. (R&M) and Texaco, Inc. to dismiss without prejudice the following Defendants:

(1) THE ESTATE OF GERALD JENKINS, DECEASED;

(2) THE ESTATE OF WALTER C. DEPPE, DECEASED; and

(3) THE ESTATE OF JOHN W. DIFFEE, DECEASED.

Hearing no objections and pursuant to Fed.R.Civ.P. 41, Plaintiffs' Motions to Dismiss the above-referenced Defendants are GRANTED.

ORDERED THIS 21 DAY OF MARCH, 1996.

Terry C. Kern
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TED SMITH AND IMOGENE SMITH,

Plaintiffs,

vs.

JUSTIN DALE BARNETT, a single person; THE UNKNOWN SPOUSE OF JUSTIN DALE BARNETT, IF ANY; TERESA DIANN BARNETT, a single person; THE UNKNOWN SPOUSE OF TERESA DIANN BARNETT, IF ANY; JOSEPH BARNETT; UNITED STATES DEPARTMENT OF THE INTERIOR; THE BUREAU OF INDIAN AFFAIRS; MUSCOGEE (CREEK) NATION; TENANT(S), IF ANY, OF ROUTE 3, BOX 165, BRISTOW, OKLAHOMA 74010,

Defendants.

ENTERED ON DOCKET
MAR 25 1996

No. 95-C-495K

FILED
MAR 22 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the motion for summary judgment by Defendant United States of America against Plaintiffs Ted Smith and Imogene Smith . The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant and against the Plaintiffs.

ORDERED THIS DAY OF 22 MARCH, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TED SMITH AND IMOGENE SMITH,

Plaintiffs,

vs.

JUSTIN DALE BARNETT, a single person; THE UNKNOWN SPOUSE OF JUSTIN DALE BARNETT, IF ANY; TERESA DIANN BARNETT, a single person; THE UNKNOWN SPOUSE OF TERESA DIANN BARNETT, IF ANY; JOSEPH BARNETT; UNITED STATES DEPARTMENT OF THE INTERIOR; THE BUREAU OF INDIAN AFFAIRS; MUSCOGEE (CREEK) NATION; TENANT(S), IF ANY, OF ROUTE 3, BOX 165, BRISTOW, OKLAHOMA 74010,

Defendants.

No. 95-C-495K

ORDER

Now before this Court is the motion by the United States of America for summary judgment declaring that Plaintiffs' Ted and Imogene Smith ("Plaintiffs") unapproved mortgage of restricted Indian land is invalid.

I. Background

James Barnett, Fullblood Creek, Roll No. NB-464, was allotted a parcel of real property, described as the E½ SE¼ of Section 6, Township 16 North, Range 9 East and the NE¼ of Section 18 North, Range 8 East, Creek County, Oklahoma. On August 5, 1969, the Acting Area Director, Muskogee Area Office, Bureau of Indian Affairs ("BIA"), authorized a conditional removal of restrictions for James Barnett of the surface only of approximately 2.5 acres, described

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as SW¼ SW¼ SE¼ SE¼ of Section 6, Township 16 North, Range 9 East, of the I.B.M., Creek County Oklahoma. On August 29, 1969, James Barnett executed a Warranty Deed Special Form for the surface only of the 2.5 acres to his son, Joseph Barnett, for love and affection. On October 20, 1970, Joseph Barnett and his wife, Eleanor Barnett, executed a Warranty Deed that conveyed 1.4462 of the 2.5 acres to the Housing Authority of the Creek Nation of Oklahoma. The deed to the Housing Authority was not approved by the Secretary of the Interior ("the Secretary"). On May 23, 1977, the heirs of James Barnett and Lizzie Starr then Barnett, exchanged warranty deeds effecting a voluntary partition of the inherited property. The 2.5 acre tract, which includes the 1.4462 acres previously conveyed to the Housing Authority, was not excepted from this deed exchange. The Housing Authority of the Creek Nation of Oklahoma executed a quit claim deed to Joseph Barnett for the 1.4462 acres on August 14, 1986. On August 5, 1987, Joseph Barnett executed a warranty deed conveying the 1.4462 acres to his daughter, Linda Lenn Barnett. This warranty deed was not approved by the Secretary. On November 9, 1990, Linda Lenn Barnett executed a warranty deed for the 1.4462 acres to her brother, Justin Dale Barnett. This warranty deed was not approved by the Secretary. On April 13, 1992, Justin Dale Barnett and Teresa Diann Barnett, Husband and Wife, issued a real estate mortgage for the 1.4462 acres to Ted and Imogene Smith. The mortgage document reflects that the 1.4462 acre tract was given as security for a loan of $10,000 from the Smiths to the Barnetts.

On September 8, 1994, the Muscogee (Creek) Nation filed a Notice of Invalidity of Deed for the 2.5 acres in the Creek County records that was executed by the Superintendent, Okmulgee Agency, BIA, which stated that the deed dated October 20, 1970, executed by Joseph Barnett and Eleanor Rachel Barnett "is void on its face and is wholly ineffective to convey any interest in the

subject property." The United States seeks a judgment that the mortgage land is owned by Joseph Barnett and is restricted against alienation unless approved by the Secretary, and that the mortgage is invalid and of no legal effect because it was not approved by the Secretary. Plaintiffs argue that the restriction against alienation was removed by the November 7, 1969 Order for Removal of Restrictions; therefore, all subsequent transactions involving the land were valid.

II. Discussion

There is no dispute that a purchaser of restricted Indian lands cannot obtain good title without the approval of the Secretary of the Interior or other authorized government officer. See Bailey v. Banister, 200 F.2d 683, 685 (10th Cir. 1952). "Where an Indian holds legal title to lands with a restriction against alienation, the title may be transferred only under rules and regulations prescribed by the Secretary of Interior, and with his consent and approval or that of his duly authorized representatives." Id. (citing, *inter alia*, 25 U.S.C.A. §§ 348, 405, 483; 25 C.F.R. § 241.36). Title to the land in question contained a restriction against its alienation. This restriction was removed by the November 7, 1969 Order ("the Order"), but the removal was conditional. See 25 C.F.R. § 152.12. The removal was to become effective only and simultaneously with the execution of the deed to Joseph Barnett.[1]

The question upon which the instant motion turns is whether the warranty deed, which itself contains a restriction against alienation, operated to preserve the restriction against alienation after the property was conveyed to Joseph Barnett, or whether the Order abrogated all

[1] The Order for Removal of Restrictions, Conditional, of November 7, 1969, provided that the restrictions against alienation "are hereby removed from the above described land, such removal to become effective only and simultaneously with the execution of a deed by said allottee to the purchaser, after said land has been sold in compliance with the regulations prescribed by the Secretary of the Interior."

such restrictions once the deed was executed. It is not clear from the record what the intentions of the Department of the Interior were in granting the conditional removal of restrictions: whether, as Plaintiffs contend, it was simply to allow the conveyance of the property to Joseph Barnett, whereupon the restriction against alienation would be lifted; or whether, as the United States contends, it was to allow the conveyance to Joseph Barnett while preserving the restriction against alienation. This Court must therefore base its ruling on the documents available to it: the Order and the warranty deed. While the Order removed the restriction against alienation upon the execution of the deed, the deed, by its plain language, reimposed that restriction. The deed includes an habendum clause that contains the following condition: "no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting title to the land herein described shall be of any force and effect, unless approved by the Secretary of the Interior or the restrictions are otherwise removed by operation of law." This provision in the deed is an effective restriction against alienation. See United States v. Board of Country Commissioners, McIntosh County, Ok., 154 F.2d 600, 603 (1946); United States v. Williams, 139 F.2d 83, 84 (10th Cir. 1943), cert. denied, 322 U.S. 727 (1944); Hass v. United States, 17 F.2d 894, 896 (8th Cir. 1927). This restriction has not been removed by operation of law, and the Secretary of the Interior has not approved any of the subsequent transactions involving the land in question. (See *supra* section I.) Therefore, subsequent executions of deeds were void, and the mortgage executed was invalid because Justin Dale Barnett did not have title to the property and the mortgage was not approved by the Secretary.

For the reasons stated above, the United States' Motion for Summary Judgment is GRANTED.

ORDERED THIS 21 DAY OF MARCH, 1996.

Terry C. Kern
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

U.S.F.& G.,

Plaintiff,

vs.

TRI-STATE INSURANCE COMPANY,

Defendant.

No. 95-C-275-K

EOD 3/25/96

JUDGMENT

This matter came before the Court for consideration of the opposing motions for summary judgment by Plaintiff U.S.F. & G. and Defendant Tri-State Insurance Company. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant Tri-State Insurance Company and against the Plaintiff U.S.F. & G.

ORDERED THIS DAY OF 22 MARCH, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

U.S.F.& G.,

Plaintiff,

vs.

TRI-STATE INSURANCE COMPANY,

Defendant.

No. 95-C-275-K

ORDER

Now before this Court are the opposing motions for summary judgment by Plaintiff U.S.F.& G. and Defendant Tri-State Insurance Company ("Tri-State"). This is a declaratory judgment action between U.S.F.& G. and Tri-State to determine coverage between a general liability carrier and a commercial auto carrier.

I. Background.

On June 9, 1993, Jim Johnson (the plaintiff in the underlying state court action) was injured when hot asphalt oil was sprayed on him from a hose connected to a pump on an asphalt spreader truck owned by Pavement Conservation Specialists, Inc. Johnson and Donnie Shores, an employee of Pavement Construction Specialists, Inc., were pumping hot asphalt oil from the asphalt spreader truck to a tank truck operated by Johnson. Johnson was injured when he attempted to unhook the end of the hose from his tank truck. Liquid asphalt in the hose, which was pressurized from the pump, sprayed Johnson. Testimony at trial indicated that the pressure in the hose was caused by Shores' improper closing of the valve on his truck before he shut off the

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pump. This allowed pressure to build up in the hose line. The pressure was released when Johnson unhooked the end of the hose attached to the tank truck.

Jim Johnson and his wife sued Donnie Shores and his employer, Pavement Conservation Specialists, Inc., alleging that the injury was caused by Donnie Shores' negligence. On February 15, 1995, a Creek County jury returned a verdict in favor of the Johnsons and against Shores and Pavement Conservation Specialists, Inc. The underlying litigation was defended by Tri-State.

At the time of Johnson's injury, U.S.F.& G had a commercial general liability ("CGL") policy in effect with Pavement Conservation Specialists, Inc., and Tri-State had a business automobile policy in effect. The policies were designed to be mutually exclusive. The Plaintiff in the underlying litigation brought garnishment proceedings against both parties in the instant action, who jointly settled the garnishment proceeding, reserving the coverage issues for determination in this proceeding. Both parties deny coverage for Johnson's injury and allege that the other party's insurance policy covers Johnson's accident.

II. Discussion

A. Summary Judgment Standard

Summary judgment, pursuant to Fed. R. Civ. P. 56, is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987). The Supreme Court explains:

[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after

adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322.

B. Merits

Johnson's injury is not covered under the clear terms of the Tri-State policy. Tri-State's business auto policy excludes from coverage bodily injury arising out of the operation of "[a]ir compressors, pumps and generators, including spraying . . . equipment."[1] Johnson's injury arose out of the operation of equipment on the spreader truck, including the pump that pressurized the asphalt oil in the hose, causing Johnson to be sprayed when he unhooked the hose from his tank truck.

---

[1] The Tri-State policy provides as follows:

B. EXCLUSIONS

THIS INSURANCE DOES NOT APPLY TO ANY OF THE FOLLOWING:

* * * *

9. OPERATIONS

"BODILY INJURY" . . . ARISING OUT OF THE OPERATION OF ANY EQUIPMENT LISTED IN PARAGRAPHS 6.B. AND 6.C. OF THE DEFINITION OF "MOBILE EQUIPMENT".

* * * *

H. "MOBILE EQUIPMENT" MEANS ANY OF THE FOLLOWING TYPES OF LAND VEHICLES, INCLUDING ANY ATTACHED MACHINERY OR EQUIPMENT:

* * * *

6. VEHICLES NOT DESCRIBED IN PARAGRAPHS 1., 2., 3. OR 4. ABOVE MAINTAINED PRIMARILY FOR PURPOSES OTHER THAN THE TRANSPORTATION OF PERSONS OR CARGO. HOWEVER, SELF-PROPELLED VEHICLES WITH THE FOLLOWING TYPES OF PERMANENTLY ATTACHED EQUIPMENT ARE NOT "MOBILE EQUIPMENT" BUT WILL BE CONSIDERED "AUTOS":

* * * *

C. *AIR COMPRESSORS, PUMPS AND GENERATORS, INCLUDING SPRAYING . . . EQUIPMENT.*

(Emphasis added).

U.S.F. & G. disputes the finding that Johnson's injury arose out of the operation of the pump, pointing to the fact that the pump was not running at the moment Johnson was sprayed. This Court disagrees with U.S.F. & G.'s narrow version of the events giving rise to Johnson's injury and its constrained interpretation of the term "arising out of." The Oklahoma Supreme Court has interpreted the term "arising out of the . . . use" in various contexts. In Safeco Ins. Co. of America v. Sanders, 803 P.2d 688, 691 (Okla. 1990), the court noted that as used in Okla. Stat. tit. 36, § 3636 (1989), "the phrase 'arising out of the ownership, maintenance or use of a motor vehicle', in ordinary and comprehensive words, encompasses a broad spectrum of factual sequences which might result in injury covered by the liability insurance policy." Id. at 691. The court adopted a "chain of events test" for deciding whether the facts show that an injury arose out of the ownership, maintenance or use of a motor vehicle. Id. The court held that "if the facts establish that a motor vehicle or any part of the motor vehicle is the dangerous instrument which starts the chain of events leading to the injury, the injury arises out of the use of the motor vehicle, as contemplated by 36 O.S.1981, 3636." Id. at 692. The court indicated that the chain of events test is similar to tests fashioned by other jurisdictions in determining the meaning of the phrase as used in the statutes and insurance contracts. Id. at 691-92 & n.6 (citing *inter alia* Allstate Insurance Co. v. Gillespie, 455 So.2d 617 (Fla.App. 1984) (indicating that inquiry is whether injury "flowed from" the use of the vehicle); Georgia Farm Bureau Mutual Ins. Co. v. Burnett, 306 S.E.2d 734 (Ga. App. 1983) (explaining that injury arises out of use of motor vehicle where injury "grew out of" use of motor vehicle and thus there is a causal connection). The Court also indicated that the requisite causal connection in an insurance controversy involves a burden that "is less than proximate cause in a tort case." Safeco, 803 P.2d at 692.

Applying this test to the instant case, it is clear that it was the operation of asphalt spreader equipment, including the pump, that started the chain of events leading to Johnson's injury. In other words, Johnson's injury flowed from the operation of the pump and accompanying equipment. The instant inquiry is not constrained by a narrow application of proximate cause under tort law; it is enough that asphalt oil pressurized by the pump sprayed Johnson in the course of his work involving equipment on the spreader truck.

Turning to the U.S.F. & G policy, the Court first notes that Johnson's claim falls within the scope of the basic coverage of the policy. The U.S.F. & G. policy provides coverage for "bodily injury" caused by an "occurrence" that takes place in the "coverage territory" and during the policy period. That Johnson's injury satisfies these requirements is beyond dispute. Thus Johnson's injury is covered under the U.S.F. & G policy unless excluded by the so-called auto exclusion:

> 2. THIS INSURANCE DOES NOT APPLY TO:
>
> * * * *
>
> G. "BODILY INJURY" . . . ARISING OUT OF THE OWNERSHIP, MAINTENANCE, USE OR ENTRUSTMENT TO OTHERS OF ANY . . . "AUTO" . . . OWNED OR OPERATED BY OR RENTED OR LOANED TO ANY INSURED.

Assuming, *arguendo*, that the asphalt spreader truck were an auto, there is still the following provision in the auto exclusion:

> THIS EXCLUSION DOES NOT APPLY TO:
>
> * * * *
>
> (5) "BODILY INJURY" . . . ARISING OUT OF THE OPERATION OF ANY OF THE EQUIPMENT LISTED IN PARAGRAPH F.(2) OR F.(3) OF THE DEFINITION OF "MOBILE EQUIPMENT" (SECTION V.8).

Paragraph f.(3) includes "air compressors, pumps and generators, including spraying . . . equipment." As discussed above, this language clearly describes the injury in the instant case.

Therefore, assuming *arguendo* that the spreader truck were an "auto," Johnson's injury is covered under the U.S.F. & G. policy, notwithstanding the auto exclusion.[2]

III. Conclusion

For the reasons stated above, summary judgment is GRANTED in favor of Tri-State Insurance Company and against U.S.F. & G.

ORDERED THIS 22 DAY OF MARCH, 1996.

Terry C. Kern
United States District Judge

[2] Were this Court to find instead that the asphalt spreader truck and attached equipment qualified as "mobile equipment" (a characterization U.S.F. & G. disputes), the result would be the same: Johnson's injury would be covered under the U.S.F. & G. policy because the auto exclusion would be inapplicable. Therefore, this Court need not reach a conclusion as to whether the asphalt spreader truck is an auto or mobile equipment.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT EUGENE DUNLAP,

Defendant.

96C85K

No. 94-CR-129-K

ORDER

Before the Court is the motion of defendant Dunlap pursuant to 28 U.S.C. §2255. Defendant was charged by indictment with one violation of 18 U.S.C. §922(g)(1) and one violation of 18 U.S.C. §924(c). On November 9, 1994, defendant pled guilty to Count II (18 U.S.C. §924(c)) and was sentenced to the mandatory sixty months. Count I was dismissed. On February 7, 1996, defendant filed the present motion, asserting his guilty plea should be vacated in light of Bailey v. United States, 116 S.Ct. 501 (1995). Bailey restricted the factual circumstances under which a §924(c) conviction is appropriate.

In response, the government asks for an evidentiary hearing to determine if sufficient evidence exists for a conviction, or in the alternative, reinstatement of the indictment. Defendant has filed no reply to the response. An evidentiary hearing seems unnecessary, because the record is clear defendant pled guilty pursuant to the pre-Bailey standard. Under similar circumstances, courts have permitted reinstatement of the indictment. Cf. Fransaw v. Lynaugh, 810 F.2d 518, 524-525 (5th Cir.1987). A new seventy-

15 2

day time limit is appropriate under 18 U.S.C. §3161(e) of the Speedy Trial Act.

It is the Order of the Court that the motion of the defendant Robert Eugene Dunlap pursuant to 28 U.S.C. §2255 is hereby GRANTED. The defendant's guilty plea, conviction and sentence are hereby VACATED. The indictment in this case is reinstated in its entirety. The Court Clerk's Office is directed to send notice of new motion deadlines, pretrial date, and trial date. The motion of the defendant for expedited hearing (#11) is hereby DENIED.

ORDERED this 21 day of March, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RANDELL NELSON,

Plaintiff,

vs.

DOLORES RAMSEY; JULIE CANFIELD; DIVISION II PROBATION AND PAROLE OFFICE; OKLAHOMA DEPARTMENT OF CORRECTIONS; and STATE OF OKLAHOMA.

Defendants.

No. 95-C-321-K

ENTERED ON DOCKET

DATE MAR 22 1996

FILED

MAR 21 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the defendants' motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendants and against the plaintiff.

ORDERED this 21 day of March, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

18

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RANDELL NELSON,

Plaintiff,

vs.

DOLORES RAMSEY; JULIE CANFIELD; DIVISION II PROBATION AND PAROLE OFFICE; OKLAHOMA DEPARTMENT OF CORRECTIONS; and STATE OF OKLAHOMA.

Defendants.

No. 95-C-321-K

ENTERED ON DOCKET

DATE MAR 22 1996

FILED

MAR 21 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER

On March 5, 1996 Magistrate Judge Wagner entered his Report and Recommendation regarding various motions. The Magistrate Judge recommended defendants' motions to dismiss or for summary judgment be granted, and plaintiff's motions for summary judgment be denied. No objection has been filed to the Report and Recommendation and the ten-day time limit of Rule 72(b) F.R.Cv.P. has passed. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify it.

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It is the Order of the Court that the motion of the defendants to dismiss or for summary judgment (#7) is hereby GRANTED. The motion of the plaintiff for summary judgment (#10) is hereby DENIED.

ORDERED this 21 day of March, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRINTON B. LANG and SUSAN B. LANG,	)	
Plaintiffs,	)	
vs.	)	No. 95-C-296-K
STATE OF OKLAHOMA, et al.,	)	
Defendants.	)	

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary. The motion of the United States to stay (#11) is DENIED.

ORDERED this 20 day of March, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EVELYN EILEEN WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 95-C-734C
	)	
CHOICE HOTELS INTERNATIONAL, INC., a Delaware corporation, JAMES LAMBETH, INC., a Missouri corporation, and JAMES LAMBETH, individually,	)	
	)	
Defendants.	)	

STIPULATION OF DISMISSAL

The parties, above named, have reached a settlement and compromise of claims asserted against the Defendants by Plaintiff. The parties have further agreed to bear their own costs and attorney fees incurred herein.

Therefore, the parties hereby stipulate that the above entitled action may be dismissed, with prejudice, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure.

DATED this 21st day of March, 1996.

Danny K. Shadid, Esq.
SHADID AND PIPES
Two Leadership Square,
Suite 420
Oklahoma City, Oklahoma 73102
Attorneys for Plaintiff

Wm. Gregory James
PRAY, WALKER, JACKMAN
WILLIAMSON AND MARLAR
900 ONEOK Plaza
Tulsa, Ok. 74103
Attorneys for Defendants

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT M. AMENT aka Bob Michael Ament; JUDY M. AMENT aka Judy Marie Ament; WINSTON C. JOHNSON; MARCELYN L. JOHNSON; CITY OF BROKEN ARROW, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95 C 477B

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20th day of March, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on February 8, 1996, pursuant to an Order of Sale dated November 7, 1995, of the following described property located in Tulsa County, Oklahoma:

> **Lot Twenty-two (22), Block Three (3), CENTRAL PARK ESTATES FIRST, an Addition in Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Robert M. Ament, Judy M. Ament, Winston C. Johnson, Marcelyn L. Johnson, City of Broken Arrow, Oklahoma, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and they

do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Broken Arrow Ledger, a newspaper published and of general circulation in Broken Arrow, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the *Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/John L. Wagner
U.S. Magistrate
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JEFFREY ALAN BARNES; ANGELA DAWN BECK fka Angela Barnes fka Angela Dawn Barnes; PERRY JUDD CAMACHO aka Perry J. Camacho aka Perry Camacho; KAREN GAYLENE CAMACHO aka Karen G. Camacho aka Karen Camacho; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; CITY OF BROKEN ARROW, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma; SCHELL SECURITY & ALARMS,

Defendants.

Civil Case No. 95 C 366BU

ORDER

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice and the Status Hearing scheduled for March 22, 1996 at 11:30 a.m. is stricken.

Dated this 20th day of March, 1996.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM B. ELDER; OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION dba Tulsa Regional Medical Center formerly dba Oklahoma Osteopathic Hospital; OAK TREE MORTGAGE CORPORATION fka United Bankers Mortgage Corporation; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95 C 611K

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20th day of March, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on February 7, 1996, pursuant to an Order of Sale dated October 31, 1995, of the following described property located in Tulsa County, Oklahoma:

LOT THREE (3), BLOCK FOURTEEN (14), CHEROKEE VILLAGE SECOND, AN ADDITION IN TULSA COUNTY, OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, William B. Elder, Osteopathic Hospital Founders Association dba Tulsa Regional Medical Center formerly dba Oklahoma

Osteopathic Hospital, Oak Tree Mortgage Corporation fka United Bankers Mortgage Corporation, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to JJB Properties, L.L.C., it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the JJB Properties, L.L.C., a good and sufficient deed for the property.

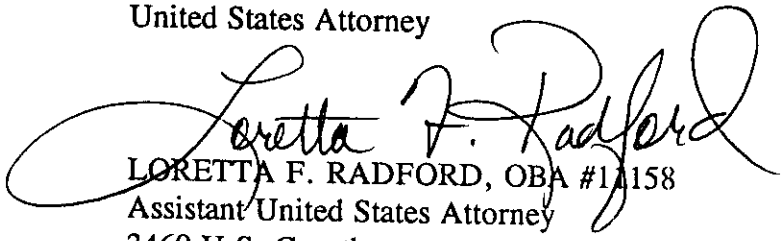
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/John L. Wagner
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 611K

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

MAR 2 0 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
MAR 2 1 1996
DATE

UNITED STATES OF AMERICA, on behalf of Rural Housing and Community Development Service, formerly known as the Farmers Home Administration,

Plaintiff,

v.

JERRY W. GALLATIN
aka Jerry Gallatin
aka Jerry Wayne Gallatin;
JEWEL A. GALLATIN
fka Jewel A. DiDomenico;
TRECA KAY GALLATIN
aka Treca K. Gallatin
aka Treca Gallatin;
SPOUSE, if any, of Treca Kay Gallatin;
COUNTY TREASURER, Osage County, Oklahoma;
BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma,

Defendants.

CIVIL ACTION NO. **95-C-306-K**

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20th day of March, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on January 3, 1996, pursuant to an Order of Sale dated August 31, 1995, of the following described property located in Osage County, Oklahoma:

> **Lot 8, Block 2, Northern Heights Addition to Hominy, Osage County, Oklahoma, according to the recorded Plat thereof. Subject, however, to all valid outstanding easements, rights-of-way, mineral leases, mineral reservations, and mineral conveyances of record.**

Appearing for the United States of America is Phil Pinnell, Assistant United States Attorney. Notice was given the Defendants, Jerry W. Gallatin aka Jerry Gallatin aka Jerry Wayne Gallatin; Jewel A. Gallatin fka Jewel A. DiDomenico; Treca Kay Gallatin aka Treca K. Gallatin aka Treca Gallatin nka Treca Kay Horton; Spouse of Treca Kay Gallatin who is one and the same person as Danny L. Horton; County Treasurer, Osage County, Oklahoma and Board of County Commissioners, Osage County, Oklahoma, through John S. Boggs, Jr., Assistant District Attorney, Osage County, Oklahoma, by mail; and Purchasers, Lyle M. Ballard and Joan M. Ballard, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Pawhuska Journal-Capital, a newspaper published and of general circulation in Osage County, Oklahoma, and that on the day fixed in the notice the property was sold to **Lyle M. Ballard and Joan M. Ballard, HC66, Box 890, Hominy, Oklahoma 74035**, they being the highest bidders. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, **Lyle M. Ballard and Joan M. Ballard, HC66, Box 890, Hominy, Oklahoma 74035**, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchasers by the United State Marshal, the purchasers be granted possession of the property against any or all persons now in possession.

S/John L. Wagner
U.S. Magistrate
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Report and Recommendation of United States Magistrate Judge
Case No. 95-C-306-K

PP:css

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD E. HEDGE; FREDA M. HEDGE; FEDERAL NATIONAL MORTGAGE ASSOCIATION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 438K

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20th day of March, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on February 8, 1996, pursuant to an Order of Sale dated October 31, 1995, of the following described property located in Tulsa County, Oklahoma:

> **Lot Twelve (12), Block Fourteen (14), AMENDED PLAT OF BLOCKS 10 THRU 16, OAK RIDGE ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Federal National Mortgage Association, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and to the Defendants, Donald E. Hedge and Freda M. Hedge, by

Publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

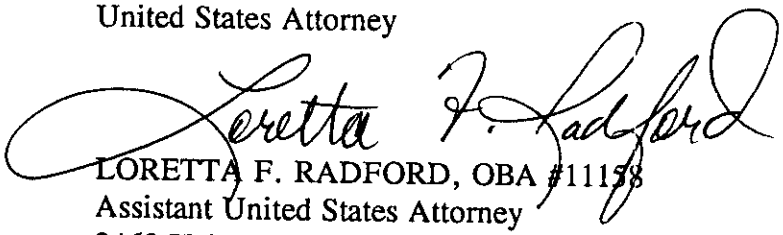
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/John L. Wagner
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 438K

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LARRY D. GOWEN aka Larry Dale Gowen; LYNN GOWEN aka Olga Lynn Gowen; COUNTY TREASURER, Rogers County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma,

Defendants.

Civil Case No. 95 C 271K

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed March 8, 1996, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and is affirmed.

It is therefore **ORDERED** that the Motion to Confirm Sale is granted.

Dated this 20 day of March, 1996.

s/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAYMOND WILSON;
TERESA A. WILSON;
COMMUNITY BUILDERS, INC.;
ROGERS COUNTY LOAN COMPANY;
COUNTY TREASURER, Rogers County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Rogers County, Oklahoma,

Defendants.

ENTERED ON DOCKET
MAR 21 1996
DATE

FILED

MAR 20 1996

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 95-C 193K

ORDER CONFIRMING SALE

The Court has for consideration the Report and Recommendation of the United States Magistrate Judge filed March 6, 1996, in which the Magistrate Judge recommended that the Motion to Confirm Sale be granted. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the Court has concluded that the Report and Recommendation of the United States Magistrate Judge should be and is affirmed.

It is therefore **ORDERED** that the Motion to Confirm Sale is granted.

Dated this 20 day of March, 1996.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

LFR:flv

AND

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. R. L. PETE PERRY; THREE LAKES VILLAGE PROPERTY OWNERS' ASSOCIATION, INC.; CITY OF OWASSO, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	Civil Case No. 95-C 102K

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20th day of March, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on February 5, 1996, pursuant to an Order of Sale dated November 1, 1995, of the following described property located in Tulsa County, Oklahoma:

> Lot One (1), Block Two (2), THREE LAKES VILLAGE, a resubdivision of a part of Lot 15, Block 3, THREE LAKES, an Addition to the City of Owasso, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, R.L. PETE PERRY, THREE LAKES VILLAGE PROPERTY OWNERS' ASSOCIATION, INC., CITY OF OWASSO, Oklahoma, COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma and to the purchasers, David W. Vines and

NOTE: THIS ... AND ... LY

Betty J. Vines, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce and Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to David W. Vines and Betty J. Vines, they being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

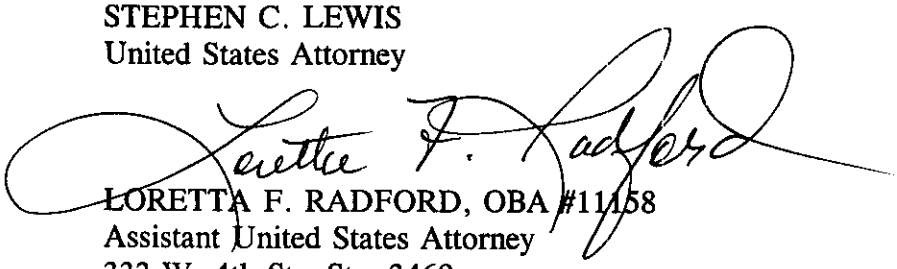
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, David W. Vines and Betty J. Vines, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/John L. Wagner
U.S. Magistrate
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th St., Ste. 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/lg

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 102K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APPLIED ENERGY SYSTEMS, INC.,)
)
Plaintiff,)
)
vs.) No. 93-C-627-K
)
WILLIAM R. RILEY,)
)
Defendant.)

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by the Clerk of the Court that all funds garnished in the above-referenced case and held by the Clerk have been disbursed to William R. Riley, Defendant, on September 14, 1995 as directed by the order of this Court, dated August 25, 1995. It futher appearing to the Court that Plaintiff has filed a "Release and Satisfaction of Judgment" on August 30, 1995, releasing the Judgment filed herein on October 19, 1994. Therefore it is not necessary that this action remain upon the calendar of the Court, and thus, the application to release garnished funds (docket #83), filed August 30, 1995, is moot.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records.

ORDERED this 20 day of March, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

84

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NATALIE SMITH,

Plaintiff,

vs.

THE AMERICAN RED CROSS and RANDALL KNOWLES,

Defendants.

No. 95-C-154-K

O R D E R

This is an action alleging sexual discrimination in employment and retaliatory discharge. The Complaint was filed February 16, 1995. A case management conference was held before the Court July 13, 1995, establishing a discovery deadline of November 30, 1995, a pretrial conference date of February 12, 1995, and a trial date of February 20, 1996. The discovery deadline was subsequently extended to December 26, 1995.

On January 8, 1996, defendant American Red Cross ("ARC") filed a motion for default judgment pursuant to Rule 37(d) F.R.Cv.P., asserting plaintiff's failure to appear for her deposition and to respond to written discovery requests. On February 5, 1996, almost one month after the motion had been filed, plaintiff filed an application for leave to file response out of time. The response attached to the application, which has never been filed, asserts illness and work conflicts as reasons for plaintiff's admitted failures.

The case came on for scheduled pretrial conference on Monday, February 12, 1996 at 10:30 a.m.. The morning of the conference,

plaintiff filed an application for continuance, asserting plaintiff's counsel had learned the previous Friday he must participate in a trial commencing in state court. In the alternative, plaintiff requested substitute counsel be permitted to appear. No one representing the plaintiff appeared at the pretrial conference, and the Court ordered the case dismissed, but granted plaintiff fifteen days to address whether dismissal should be with prejudice or without prejudice. Plaintiff has filed her response, and defendants have not replied.

The standards for granting a default judgment under Rule 37(d) and for ordering a dismissal with prejudice are roughly similar. A default judgment is a harsh sanction that will be imposed only when the failure to comply with discovery demands is the result of wilfulness, bad faith or some fault, rather than inability to comply. See M.E.N. Co. v. Control Fluidics, Inc., 834 F.2d 869, 872 (10th Cir.1987). If the fault lies with the attorneys, that is where the impact of the sanction should be lodged. Mulvaney v. Rivain Flying Serv., Inc., 744 F.2d 1438, 1442 (10th Cir.1984). In making findings on the issue of fault, a court should consider such factors as (1) the degree of actual prejudice to the other party; (2) the amount of interference with the judicial process; (3) the culpability of the litigant. Finally, a court should not enter a default judgment without first considering if lesser sanctions would be effective. Ocelot Oil Corp. v. Sparrow Industries, 847 F.2d 1458, 1465 (10th Cir.1988). Roughly the same factors are to be considered when contemplating dismissal with prejudice, along

with "whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance." Jones v. Thompson, 996 F.2d 261, 264 (10th Cir.1993).

Upon review, the Court sees a pattern of missed deadlines on plaintiff's part. Assigning percentages of fault between the litigant and her counsel is not possible based on the present record. Plaintiff should not commence litigation if her work schedule and health prohibit her necessary participation in the process. However, the record does not reflect fault so grave that the extreme sanction of dismissal with prejudice be imposed. If plaintiff elects to file this lawsuit once more, whether it is assigned to this Judge or another, a repetition of the pattern evident in this case will almost certainly result in the imposition of sanctions, and possibly dismissal with prejudice.

It is the Order of the Court that this action is hereby DISMISSED without prejudice. All pending motions are deemed moot.

ORDERED this 20 day of March, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 20 1996
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

LINDA LEE,

Plaintiff,

vs.

CITY OF TULSA, a municipality in the State of Oklahoma, and RETHAL WISDOM, an individual,

Defendants.

Case No. 95-C-690-BU

ENTERED ON DOCKET
DATE MAR 21 1996

ORDER

This matter comes before the Court upon Plaintiff, Linda Lee's Motion for Dismissal Without Prejudice. Defendant, City of Tulsa, has responded to the motion and upon due consideration, the Court finds that Plaintiff's motion should be granted.

Accordingly, Plaintiff, Linda Lee's Motion for Dismissal Without Prejudice is hereby GRANTED. This action is hereby DISMISSED WITHOUT PREJUDICE.

ENTERED this 20th day of March, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELIZABETH WARREN BLANKENSHIP TRUST A, PATRICIA WARREN SWINDLE TRUST A, JEAN WARREN YOUNG TRUST A, MARILYN WARREN COWART TRUST A, DOROTHY WARREN KING TRUST A, NATALIE O. WARREN LIVING TRUST (JOHN GABERINO, TRUSTEE),

Plaintiff,

vs.

UNION PACIFIC RESOURCES COMPANY

Defendant.

No. 94-C-911-K

O R D E R A N D J U D G M E N T

Now before this Court is Parties' Agreed Order for Dismissal with Prejudice. Parties in the above-captioned action have informed this Court that they have resolved their issues and wish the case be dismissed with prejudice as to any further action, each side bearing their own costs. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the action be dismissed with prejudice, and that each side bear its own costs.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this judgment by United States mail upon the attorneys for the parties appearing in this action.

ORDERED this 20 day of March, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 19 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

SUN COMPANY, INC., (R & M), a Delaware corporation, and TEXACO INC., a Delaware corporation,

Plaintiffs,

vs.

BROWNING-FERRIS, INC., a Delaware corporation, successor in interest to Tulsa Container Services, Inc.; et al.

Defendants.

Case No. 94-C-820-K

EOD 3/21/96

ORDER

NOW on this 12th day of March, 1996, comes on for hearing the Application for Attorney Fees for Group II Counsel which was filed by Terence P. Brennan, Liaison Counsel for the Group II Defendants, on February 21, 1996, on behalf of the work done by the law firm of Gardere & Wynne in performing legal services on behalf of Group II pursuant to the Case Management Order.

No objections have been filed with respect to said Application and no objection is made in open Court.

The Court finds that said Application is in compliance with the rules of this Court; that the fees and charges set forth therein are reasonable and proper in all respects; and that said Application should be approved.

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IT IS THEREFORE ORDERED that the above-referenced Application be and the same is hereby approved, and Liaison Counsel is hereby authorized and ordered to pay from the Group II Defendants' Liaison Counsel Trust Account to the law firm of Gardere & Wynne:

1. $2500.00 for the work it performed in preparing Group II's Motion for Summary Judgment and Supplementation of Authority to Group II Defendants' Brief in Support of Motion to Dismiss and

2. its allocation of the $5000.00 Group II Summary Judgment Reply Brief fee as previously ordered by the Court to be divided by agreement between Gardere & Wynne and Doerner, Saunders, Daniel & Anderson for work these law firms performed on the Group II Summary Judgment Reply Brief.

John Leo Wagner, United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUN COMPANY, INC. (R&M), a Delaware corporation, and TEXACO, INC., a Delaware corporation,

Plaintiffs,

vs.

BROWNING-FERRIS, INC., a Delaware corporation, et al.,

Defendants.

ENTERED ON DOCKET
DATE MAR 21 1996

No. 94-C-820-K

FILED
MAR 20 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER

Now before this Court is the motion for summary judgment by Defendant Group II ("Defendants")[1] against Plaintiffs Sun Company, Inc. and Texaco, Inc. ("Plaintiffs"). Plaintiffs brought this action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*, for costs expended by Plaintiffs in response to an order by the Environmental Protection Agency ("EPA") to perform remediation

[1] Defendant Group II members include: Atlantic Richfield Company, Bankoff Oil Co., Inc., Beverage Products Corp., Borg Industrial Group, Inc., d/b/a American Container Services, Browning-Ferris, Inc., Consolidated Cleaning Service Co., Cowen Construction, Charles Forhan, d/b/a D & W Exterminating, National Tank Co., Oil Capital Trash Services, Inc., Peevy Construction Co., Inc., Public Service Co. of Oklahoma, Steve Richey d/b/a Richey Refuse Service, City of Sand Springs, John D. Shipley, Monte Shipley, Shipley Refuse, Robert E. Sparks, d/b/a Tulsa Industrial Service, Sun Chemical Corporation, Union Carbide Corp., and Waste Management of Oklahoma, Inc., successor to Tulsa Industrial Disposal Services.

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at the Compass landfill site ("the Site"), pursuant to section 106 of CERCLA, 42 U.S.C. § 9606. Plaintiffs also seek a declaratory judgment declaring their right to recover past and future response costs attributable to cleanup of the Site. In addition, Plaintiffs assert state law claims of contribution and/or indemnity against Defendants.

I. Facts

The Site is a piece of property situated on the south bank of the Arkansas River in Tulsa County. It is an abandoned limestone quarry that was operated as a permitted landfill from 1972 to 1976. During the time of its operation, material containing hazardous substances within the meaning of CERCLA section 101(14), 42 U.S.C. § 9601(14), were delivered to the Site. This material began to be released into the soil, surface water, and groundwater near and beneath the Site. The EPA found amounts of hazardous substances in the soil and groundwater beneath the Site, including chemicals listed as hazardous substances within the meaning of section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

In September 1984, the EPA placed the Site on the National Priority List. 40 C.F.R. Part 300, App. B. On September 29, 1987, the EPA issued a Record of Decision ("ROD"), which selected a remedy for the site that was deemed by the EPA and the State of Oklahoma to be consistent with CERCLA and the National Contingency Plan ("NCP"), 33 U.S.C. § 1321(c); 42 U.S.C. § 9605; 40 C.F.R. Part 300, *et seq*. The remedy selected by the EPA specified a "RCRA" quality cap or cover to be placed over the contaminated material,

with a synthetic liner between the cap and the contaminated materials to prevent seepage or drainage of rainwater, installation and monitoring of wells for purposes of compliance monitoring of groundwater, site grading, diversion of surface water, air emissions monitoring, installation of fences and signs along the perimeter of the cap, monitoring of the Site for a period of 30 years to ensure that no significant contamination concentrations migrate from the Site, and if necessary, collection and on-site treatment of contaminated groundwater. On May 31, 1989, in a Unilateral Administrative Order styled, In the Matter of Braniff, Inc., et al., United States Environmental Protection Agency, Region 6, Dallas, Texas, Docket Number CERCLA VI-05-89, the EPA ordered Plaintiffs, pursuant to section 106 of CERCLA, 42 U.S.C. § 9606, to remediate the Site as set forth in the ROD. Plaintiffs Sun and Texaco agreed to perform the remediation in compliance with the Administrative Order and ROD. Plaintiffs began remediation activities in January 1990. Response actions were completed on or by August 29, 1991. Plaintiffs incurred response costs as a result of the Administrative Order.

Plaintiffs filed the instant action on August 29, 1994, seeking to recover from Defendants the costs that Plaintiffs expended in response to the Administrative Order and seeking a declaratory judgment allocating liability for past and future response costs.

II. Discussion

A. Summary Judgment Standard

Summary judgment, pursuant to Fed. R. Civ. P. 56, is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987). The Supreme Court explains:

> [T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322. "The questions of statutory construction and legislative history raised herein present legal questions properly resolved by summary judgment." State of Oklahoma v. Weinberger, 741 F.2d 290, 291 (10th Cir. 1983), cert. denied sub nom Farrah v. United States, 466 U.S. 971 (1984) (citing Union Pacific Land Resources Corporation v. Moench Investment Company, Ltd., 696 F.2d 88 (10th Cir.), cert. denied, 460 U.S. 1085 (1982)).

B. CERCLA Causes of Action

The first issue is which causes of action are available to Plaintiffs under CERCLA, as amended by the Superfund Amendment and Reauthorization Act of 1986 ("SARA"), 100 Stat. 1613 (1986). In

United States v. Colorado & Eastern Railroad, 50 F.3d 1530 (10th Cir. 1995), the Tenth Circuit explained that CERCLA provides two types of legal actions by which parties can recoup some or all of their costs associated with hazardous waste cleanup: cost recovery actions under CERCLA section 107(a), 42 U.S.C. § 9607(a), and contribution actions under CERCLA section 113(f), 42 U.S.C. § 9613(f). Id. at 1535. Plaintiffs assert causes of action under both sections; Defendants contend that Plaintiffs can only bring a section 113(f) contribution action.

Although the circuits are divided, the Tenth Circuit has decided this question, and this Court must follow the precedent of the Tenth Circuit regardless of this Court's views concerning the advantages of the precedent of our sister circuits. United States v. Spedalieri, 910 F.2d 707, 709 n.2 (10th Cir. 1990). In Colorado & Eastern, the Tenth Circuit held that "claims between [Potentially Responsible Parties ("PRPs")] to apportion costs between themselves are contribution claims pursuant to § 113 regardless of how they are pled." Colorado & Eastern Railroad, 50 F.3d at 1539. Therefore, the only cause of action available to a PRP seeking to recover from another PRP for cleanup costs is a § 113(f) contribution action. Id. at 1536. See also Bancamerica Commercial Corp. v. Trinity Industries, 900 F. Supp. 1427, 1450 (D. Kan. 1995) ("The Tenth Circuit recently held that when one potentially responsible party sues another to recover expenditures incurred in cleanup and remediation, the claim is one for contribution and is controlled by § 113(f).") (Citing Colorado & Eastern).

There is no genuine issue as to the classification of Plaintiffs as PRPs under CERCLA section 107(a), 42 U.S.C. § 9607(a). Although Plaintiffs apparently dispute, parenthetically, that they are PRPs (Plaint. Resp. at 5), they concede that they generated wastes containing hazardous substances that were transported to the Site. (See Plaint. Resp. at 4 (not disputing Defendants' statement of undisputed material fact No. 7).)[2] "Generator" or "arranger" liability under section 107 (a)(3) of CERCLA is imposed on

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . .

42 U.S.C. § 9607(a)(3).

Courts have construed this section broadly in holding generators liable under CERCLA. See United States v. Hardage, 750 F. Supp. 1444, 1458 (W.D. Okla. 1990); United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1380 (8th Cir. 1989) (noting that courts have concluded that a liberal judicial interpretation of arranger liability provision is consistent with CERCLA's remedial statutory scheme). A generator need not have selected the site; indeed, courts have held defendants "arranged

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[2] See also EPA's First Amended Unilateral Order, attached at Def. Br. Supp. Summ. J. Ex. A at 9-11 (classifying Sun and Texaco as responsible parties pursuant to section 107 of CERCLA); Plaintiffs' Allocation Sheet, attached at Def. Br. Supp. Summ. J. Ex. C (listing selves as PRPs); EPA Allocation Sheet, attached at Def. Br. Supp. Summ. J. Ex. D (listing Plaintiffs as PRPs).

for" disposal of wastes at a particular site even when defendants did not know the substances would be deposited at that site or in fact believed they would be deposited elsewhere. See id. at 1381; United States v. Ward, 618 F. Supp. 884, 895 (E.D. N.C. 1985); State of Missouri v. Independent Petrochemical Corp., 610 F. Supp. 4, 5 (E.D. Mo. 1985); United States v. Wade, 577 F. Supp. 1326, 1333 n.3 (E.D. Pa 1983).

Under CERCLA, a party who generates hazardous substances and arranges for their disposal is strictly liable for all costs of remediating environmental damages at the site where the substances ultimately are deposited, regardless of whether the party was at fault or whether the substance actually caused or contributed to any damages. See St. Paul Fire and Marine Ins. v. Warwick Dyeing, 26 F.3d 1195, 1197-98 (1st Cir. 1994). Since Plaintiffs admit generating the substances that were transported and ultimately deposited at the Site, and since Plaintiffs' wastes were by their own estimation present at the Site at the time of the cleanup, and given the fact that Plaintiffs have proffered no evidence, nor even a cogent argument, contrary to a finding that they are PRPs, this Court finds that Plaintiffs are PRPs. See Cook v. Jackson Nat. Life Ins. Co., 844 F. Supp. 1410, 1412 (D.Colo. 1994) (holding that party opposing summary judgment motion "must produce specific facts showing that there remains a genuine issue of material fact for trial;" mere assertions not enough to survive summary judgment) (citing Branson v. Price River Coal Co., 853 F.2d 768,

771-72 (10th Cir. 1988)).[3] Therefore, since the instant CERCLA action involves PRPs seeking to recover from other PRPs for cleanup costs, Plaintiffs are limited to a contribution action pursuant to CERCLA section 113(f). See Colorado & Eastern Railroad, 50 F.3d at 1536, 1539.

Plaintiffs contend that under Key Tronic v. United States, 114 S.Ct. 1960 (1994), they are entitled to bring both a CERCLA section 107(a) action as well as a section 113(f) action, and that Colorado & Eastern can be distinguished from the instant case. In Key Tronic the Court considered whether CERCLA permitted the recovery of attorney fees; the Court did not focus on the exclusivity of section 113 actions in disputes between PRPs. The Court indicated that with the passage of SARA, both sections 107 *and* 113 provide a cause of action for private parties seeking to recover cleanup costs. "[T]he statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107." Id. at 1966. Plaintiffs contend that Key Tronic supports their argument that both sections 107 and 113 provide viable causes of action in the instant case.

This Court does not believe Colorado & Eastern is distinguishable from the instant case; therefore, Colorado & Eastern controls.[4] Plaintiffs point to the fact that Key Tronic

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[3] Since Defendants' status as PRPs is a condition precedent to recovery by Plaintiffs under CERCLA, it is assumed for purposes of this order that Defendants are PRPs as well.

[4] Moreover, this Court presumes that Colorado & Eastern is consistent with Key Tronic, which was decided nine months prior to Colorado & Eastern. See also United Technologies Corp. v. Browning-Ferris Industries, 33 F.3d 96, 103 n.12 (1st Cir. 1994) (noting that its holding that a

involved a claim for response costs incurred independently of a civil action, as in the instant litigation; whereas, Colorado & Eastern involved claims asserted subsequent to a civil action. Without pointing to language by either the Supreme Court or Tenth Circuit, Plaintiffs argue that when, as here, a party incurs response costs *prior* to a civil action, it may bring either a section 107 or 113 action (or both) against other PRPs; whereas, when a party incurs response costs *subsequent* to a civil action, it may only bring a section 113 action. The Tenth Circuit, however, makes no such distinction. It states simply, "Whatever label [Appellee] may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make." Colorado & Eastern, 50 F.3d at 1536. Noting that the two parties were PRPs, the Court held that any claim that would reapportion costs between them "is the quintessential claim for contribution." Id. at 1536 (citing Restatement (Second) of Torts § 886A and Amoco Oil Co. v. Borden Inc., 889 F.2d 664, 672 (5th Cir. 1989)).[5] Since the instant case involves claims between PRPs to apportion costs between themselves, Plaintiffs are confined to bringing a section 113(f) contribution action, regardless of how they plead their

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PRP was limited to a § 113(f) contribution action was consistent with Key Tronic), cert. denied, 115 S.Ct. 1176 (1995).

[5] A civil action clearly is not a precondition for bringing a contribution action, either under CERCLA, see § 113(f)(1) ("Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title."), or common law, see Restatement (Second) of Torts § 886A.

claims. As a Utah district court explained, it is the parties' status as PRPs that limits Plaintiffs to a section 113 contribution claim, in accordance with Colorado & Eastern. See Ekotek Site PRP Committee v. Self, 881 F. Supp. 1516, 1521 (D. Utah 1995) (holding that cost recovery action by one PRP against another PRP is limited to a section 113(f) contribution action and declining to distinguish Colorado & Eastern based on whether claimant had voluntarily incurred response costs).

C. Statute of Limitations for CERCLA Action

Neither Plaintiffs nor Defendants dispute that the applicable statute of limitations for a section 113 contribution action is three years. See 42 U.S.C. § 9613(g)(3). The issue in dispute is when the statute of limitations begins to accrue. Both parties agree that under the literal terms of the statute, no triggering event has yet occurred in the present case. The statute of limitations section governing contribution actions provides as follows:

> No action for contribution for any response costs or damages may be commenced more than three years after--
>
> **(A)** the date of judgment in any action under this chapter for recovery of such costs or damages, or
>
> **(B)** the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. § 9613(g)(3). Plaintiffs incurred cleanup costs in response to an EPA § 106 Administrative Order, not one of the triggering events listed above.

Therefore, the question is whether the statute of limitations

has yet to accrue--and as Defendants point out, may never accrue--or whether this Court must supply a triggering event for accrual of the statute of limitations. One district court in this circuit has held that when a PRP incurs response costs as a result of an EPA consent order, that PRP's subsequent contribution action is not subject to the statute of limitations because the consent order is not one of the four triggering events under CERCLA section 113(g)(3). Ekotek Site PRP Committee v. Self, 881 F. Supp. 1516, 1522-24 (D. Utah 1995). See also Gould, Inc. v. A&M Battery and Tire Service, 901 F. Supp. 906, 914-15 (M.D. Pa. 1995) (holding that since none of the four § 113(g)(3) triggering events had occurred, plaintiff's contribution claim was not time barred).

This Court disagrees. Such a result would provide a loophole at odds with the purposes of CERCLA. The structure of the statute indicates a legislative intent to restrict cost recovery and contribution actions to definite periods of time. See 42 U.S.C. § 9613(g). No public policy interest consistent with CERCLA would be served by allowing certain PRPs unlimited time in which to bring a contribution action simply because they happen to incur cleanup costs in response to a particular species of governmental prodding.[6] Rather, Congress' failure to supply a triggering event for cases such as the instant one--where cleanup costs are incurred as a result of an EPA § 106 administrative order--appears to be an

[6] Plaintiffs' remediation of the Site can hardly be characterized as voluntary. As Plaintiffs acknowledge, a party receiving an EPA § 106 order "is faced with little choice but to comply." (Plaint. Resp. at 3.) Challenges to ordered remedial action are limited under the statute, and penalties for noncompliance are severe. See 42 U.S.C. § 9606 (b).

inadvertent omission. This Court does not discern an intent by Congress to allow PRPs in Plaintiffs' circumstances to keep other PRPs on the hook indefinitely. Indeed, there are strong public policy interests that militate against allowing parties, such as Plaintiffs, who do not enter into a settlement with the EPA but incur response costs as a result of prodding by an EPA administrative order, to evade a statute of limitations on subsequent contribution actions.

Since the CERCLA statute does not provide a triggering event for cases such as the instant one, this Court must supply one, looking to federal common law for guidance. See Baker v. Bd. of Regents, Kansas, 991 F.2d 628, 632 (10th Cir. 1993) ("Federal law controls questions relating to accrual of federal causes of action.") (citing Newcomb v. Ingle, 827 F.2d 675, 678 (10th Cir. 1987)). While the Tenth Circuit has not established a federal common law rule for the accrual of contribution actions, the Third Circuit has. This Court adopts that standard: Absent a judgment, a cause of action for contribution does not arise until the party seeking contribution has paid more than her fair share of a common liability. Sea Land Service, Inc. v. United States, 874 F.2d 169, 171 (3rd Cir. 1989). See also Bradford v. Indiana & Michigan Elec. Co., 588 F. Supp. 708, 714 (D. W.Va 1984) (quoting Northwest Airlines, Inc. v. Glenn L. Martin Co., 161 F. Supp. 452, 458 (D. Md. 1958)). See generally, Maurice T. Brunner, Annotation, *When Statute of Limitations Commences to Run against Claim for Contribution or Indemnity Based on Tort*, 57 ALR 3d 867, 877

("[T]he cause of action for contribution accrues--becomes a right enforceable in a court action--when one of the joint tortfeasors pays more than his proportionate share of the damages. On the date of such payment the inchoate claim ripens into maturity, and whatever the applicable period of limitations, the time then starts to run.").

D. Statute of Limitations for State Law Cause of Action

Again there is a dispute as to the applicable statute of limitations for a contribution action brought under Oklahoma law. Although section 832 of title 12 of the Oklahoma Statutes provides a right of contribution among two or more persons who become jointly or severally liable in tort for the same injury to persons or property, there is no provision within title 12 or any other statute that establishes a statute of limitations for contribution actions. Nevertheless, section 95(2) of title 12 establishes a three-year statute of limitations for "an action upon a liability created by statute other than a forfeiture or penalty." Since Plaintiffs bring a contribution claim under a statute--Okla. Stat. tit. 12, § 832 (1996)--their action falls under the terms of the section 95(2) limitation provision.[7] Both parties agree that Oklahoma has the same accrual rule for contribution actions as that

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[7] Plaintiffs contend that the appropriate statute of limitations is provided by a residual catch-all provision in title 12 which establishes a five-year limitations period for "[a]n action for relief, not hereinbefore provided for . . . ." Okla. Stat. tit. 12, § 95(9) (1996). Since section 95(2) clearly provides the statute of limitations in the instant case, the residual provision does not apply. Defendants argue, *inter alia*, that contribution claims are governed by the same limitation period as the underlying cause of action, citing Gilliland v. Snedden, 159 P.2d 734 (Okla. 1944). This Court does not read Gilliland to stand for that proposition.

described above under federal common law. See Wilson v. Crutcher, 56 P.2d 416, 417 (Okla. 1936) ("[T]he statute of limitations does not begin to run against a claim for contribution until the plaintiff has discharged the common debt, or paid more than his share of it."). Therefore, Plaintiffs' state law action for contribution is under the same time limitations as their CERCLA contribution action: three years from the point in time at which Plaintiffs paid more than their fair share of the response costs.

E. Is Plaintiffs' Entire Contribution Claim Time Barred?

There remains the question of whether the three-year statute of limitations bars Plaintiffs' entire claim if they filed the instant action more than three years after they paid their pro rata share, or whether they are simply barred from recovering any costs paid prior to the three-year cutoff. While the law in the Tenth Circuit and in Oklahoma is not clear on this question, state courts in Kansas, Kentucky and Wisconsin have employed the following rule: Where one of multiple co-obligors, between whom there may be contribution, makes partial payments on the obligation, the statute of limitations begins to run as to such payments from the time he pays the creditor more than his proportion of the debt, *and runs separately on each payment made after the co-obligor pays his fair share, and is computed separately on each payment from the date upon which it is made.* See Kee v. Lofton, 737 P.2d 55, 59 (Kan. App. Ct. 1987) (citing Robinson v. Jennings, 70 Ky. 630 (1870)); Bushnell v. Bushnell, 46 N.W. 442 (Wis. 1890). In other words, if one co-obligor has made partial payments aggregating more than his

share of the debt, but the statute of limitations has run as to some of those payments, he is entitled to judgment against his co-obligors for the full amount of payments on which the statute has not run, provided such sum is less than the defendant co-obligor's proportion of the debt, and the payments on which the statute has run equal or exceed the claimant's proportion. See 18 Am. Jur. 2d *Contributions* § 104 (1964).

This Court finds this rule just and equitable under the instant circumstances and adopts it for determining what expenditures by Plaintiffs are within the period of limitations. Although it appears that the bulk of Plaintiffs' claims for contribution are time-barred, Plaintiffs are entitled to recover by contribution any payments made within three years of their filing of the instant action, provided they paid their fair share prior to that date.

F. Declaratory Judgment

Plaintiffs seek, *inter alia*, a declaratory judgment allocating liability for past and future response costs. Defendants argue that Plaintiffs are not entitled to a declaratory judgment because they are limited to a section 113 contribution action, and CERCLA section 113(g)(2) provides for declaratory relief only in section 107 actions. Defendants are only partially correct.

Since this Court has determined that Plaintiffs are limited to a section 113 contribution action, they are not entitled to a declaratory judgment under section 113(g)(2). However, this Court

retains inherent authority, absent an express statutory command to the contrary, to fashion appropriate remedies in civil suits over which it has jurisdiction. See 28 U.S.C. § 2201(a).[8] This Court may enter a declaratory judgment on a question if it presents a definite and concrete controversy, touching the legal relations of parties having adverse legal interests. The controversy "must be . . . real and substantial . . . admitting of specific relief through a decree of a conclusive character." Kunkel v. Continental Casualty Co., 866 F.2d 1269, 1273-74 (10th Cir. 1989); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937). Cf. U.S. National Bank of Oregon v. Independent Insurance Agents, 113 S.Ct. 2173, 2178 (1993) ("The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy," and "a federal court [lacks] the power to render advisory opinions.").

Given the circumstances and facts alleged in the instant case, there is no doubt that the question of what rule governs apportionment of response costs between parties presents a real and substantial controversy, touching the legal relations of parties

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[8] The Declaratory Judgment Act provides:

In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a).

having adverse legal interests.[9] Although it is not clear what, if any, expenses Plaintiffs incurred within the limitations period, Plaintiffs allege that they "will continue to incur response costs that are consistent with the NCP with respect to the site to abate the alleged release or threatened release of hazardous substances into the environment which has occurred or may occur from the site." (Third Amend. Compl. ¶ 107.) The remedy required by the EPA involves likely future expenditures, including continuing monitoring and possible future treatment. See discussion of required remediation supra page 2-3.

Therefore, since the question of the apportionment scheme for past and future response costs does present a real controversy, and a ruling will clarify a legal question at issue and mitigate uncertainty, a declaratory judgment is appropriate. See Kunkel, 866 F.2d at 1275. However, given the uncertainty as to the amount of response costs incurred within the limitations period, and the amount likely to be incurred in the future, this Court need not, indeed it cannot, issue a ruling defining the precise contours of an apportionment scheme. The Tenth Circuit has explained that the declaratory relief granted need not entirely dispose of the matter; necessary and proper relief based upon factual disputes not yet

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[9] Several circuits have considered whether CERCLA claims, which by their nature are often speculative, support a declaratory judgment. The Sixth Circuit noted that it is not essential that the threatened injury be absolutely immediate and real; only sufficiently immediate and real. Kelley v. E.I. DuPont De Nemours and Co., 17 F.3d 836, 845 (6th Cir. 1994). See also Emory v. Peeler, 756 F.2d 1547, 1552 (11th Cir. 1985) (holding that a party seeking declaratory relief in a CERCLA action must allege facts to support a likelihood that his opponent's injurious conduct has continued or will be repeated in the future).

resolved may be sought at a later time. Kunkel, 866 F.2d at 1274 (citing 28 U.S.C. §§ 2201-02).

Insofar as this Court can clarify, to some degree, the legal relations between the parties, it holds as follows. Since Plaintiffs are limited to a section 113 contribution action, they are not automatically entitled to seek joint and several liability from Defendants, as are section 107 plaintiffs; rather, Plaintiffs are limited to seeking Defendants' equitable share. However, given the uncertainty as to the amount of claims available to Plaintiffs, it is not presently possible to determine what equitable factors should govern the apportionment of response costs. See 42 U.S.C. § 9613(f)(1) ("In resolving contribution claims, the court may allocate response costs among the liable parties under such equitable factors as the court determines are appropriate."). The Tenth Circuit has explained that a district court "has considerable discretion in apportioning equitable shares of response costs. It can allocate the response costs among the liable parties using any equitable factors it deems appropriate." FMC Corp. v. Aero Indust., 998 F.2d 842, 846 (10th Cir. 1993). Analogously, this Court must consider equitable factors presented by the present case in determining what precise apportionment scheme to apply. Assuming that Plaintiff paid their fair share prior to the initiation of the three-year limitations period, the question remains whether Plaintiffs may impose joint and several liability against all Defendants for all costs incurred after that date, in which case the Defendants would bear the burden of splitting their

share, or whether Plaintiffs are limited to recovering from each Defendant on a several basis.[10]

For the same reasons, it is premature to rule on the appropriate credit rule. As Judge Brett observed, a district court "has the discretion to apply the credit rule which under the facts of the instant case will best achieve the overriding purpose and objectives of CERCLA." Atlantic Richfield Co. v. American Airlines, 836 F. Supp. 763, 766 (N.D. Okla. 1993). Since the actual amount in controversy is unclear, it is not possible to determine which credit rule--the proportionate rule or the *pro tanto* rule--would be most equitable and efficacious in the instant case.

III. Conclusion

Defendants' motion for summary judgment is granted in part and denied in part. Plaintiffs' first, second and third claims for relief under CERCLA section 107(a) are dismissed. Plaintiffs may pursue a CERCLA 113(f) contribution claim and state law contribution claim as to those response costs incurred within three

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[10] Several district courts that have addressed this question have limited plaintiffs pursuing a section 113 contribution action to obtaining several liability against defendants. See Plaskon Electronic Materials v. Allied-Signal, 904 F. Supp. 644, 651 (N.D. Ohio 1995) (noting that liability under § 107(a) is joint and several, while liability under § 113(f) is merely several) (citing Kaufman & Broad-South Bay v. Unisys Corp., 868 F. Supp. 1212, 1213-15 (N.D. Cal. 1994)); Gould Inc. v. A & M Battery and Tire Service, 901 F. Supp. 906, 913 (M.D. Pa. 1995) ("Since liability under a § 113 action is several, not joint and several, each party is only responsible for their proportionate share of the harm caused at the [CERCLA site]."). Nevertheless, this Court may devise an apportionment scheme based on equitable principles suitable to the circumstances of the instant case.

years of the filing of the instant action--that is, on or after August 30, 1991. This Court reserves ruling on Plaintiffs' request for declaratory relief regarding the nature of Defendants' liability pending the submission of supplemental briefs by both parties detailing response costs incurred on or after August 30, 1991, as well as those costs likely to be incurred in the future, and discussing appropriate equitable factors that the Court should consider in deciding the nature of Defendants' liability and the appropriate credit rule. Parties are directed to file supplemental briefs within 30 days of the filing of this Order.

IT IS SO ORDERED THIS 19 DAY OF MARCH, 1996.

Terry C. Kern
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JANE CANDACE MITCHELL,

Plaintiff,

vs.

GANNON REEVES,

Defendants.

No. 94-C-954-K

JUDGMENT

This action came on for consideration before the Court and jury, Honorable Terry C. Kern, District Judge, presiding, and the verdict having been duly rendered,

IT IS THEREFORE ORDERED that the Plaintiff Jane Candace Mitchell recover from the Defendant Gannon Reeves the sum of $10,000.00, with post-judgment interest thereon at the rate of 5.25 percent as provided by law.

ORDERED this 20 day of March, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

IN RE:	
HAROLD EDWARD STAPLES, III,	Case No. 95-02952-C (Chapter 7)
Debtors,	
Debtors,	Adversary No. 96-0014-C
PATRICK J. MALLOY, III, Trustee,	
Plaintiff,	
vs.	Case No. 96-C-136-BU
HAROLD E. STAPLES, JR., and MARY F. STAPLES,	
Defendants.	

ORDER

As the parties have consented to a jury trial before Bankruptcy Judge Steven J. Covey pursuant to 28 U.S.C. § 157(e) and the United States District Court for the Northern District of Oklahoma has specially designated the Bankruptcy Judges of the Northern District to conduct jury trials pursuant to 28 U.S.C. § 157(e), the Court hereby **DECLARES MOOT** Defendants' Motion to Withdraw the Reference (Docket Entry #1) and **DISMISSES** this matter.

ENTERED this 20th day of March, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

2

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL J. SWAN, Successor to
BUCHBINDER & ELEGANT, P.A.,
Receiver of Aikendale Associates,
a California Limited Partnership,
ROBERT MARLIN and JACK D. BURSTEIN,

Plaintiffs,

v.

SOONER FEDERAL SAVINGS AND LOAN
ASSOCIATION, W.R. HAGSTROM,
EDWARD L. JACOBY, DELOITTE,
HASKINS & SELLS, PAINEWEBBER,
INCORPORATED and STEPHEN ALLEN,

Defendants.

Case No: 89-C-843-E

REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

This report and recommendation pertains to Plaintiffs' Motion To Strike Discovery Schedule And For Sanctions Against Deloitte (Docket #286), Deloitte Haskins & Sells' Response To Plaintiffs' Motion To Strike Discovery Schedule And For Sanctions Against Deloitte (Docket #287), and Plaintiffs' Reply To Deloitte's Response To Plaintiffs' Motion To Strike Discovery Schedule And For Sanctions (Docket #291). A hearing was held on March 11, 1996, and oral arguments were heard.

The court recommends that the motion be granted in part and denied in part. The parties agree that the Supreme Court's ruling on a certified question in Cray v. Deloitte, Haskins & Sells, Case No. 90-C-682-E, will be instructive on issues in this case. The court therefore recommends that discovery in this case be extended an additional four months, and the pretrial

and trial dates be stricken until the Supreme Court has made its ruling.

It is further recommended that the Plaintiffs' Motion for Sanctions be denied, with permission to plaintiffs to re-urge the motion if problems in this case escalate. The parties are encouraged to notify the court if issues arise that need resolution in upcoming months.

Dated this 19th day of March, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
SAUNDRA J. HAYES; TULSA DEVELOPMENT AUTHORITY; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	Civil Case No. 95 C 577C

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20th day of March, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on February 8, 1996, pursuant to an Order of Sale dated October 31, 1995, of the following described property located in Tulsa County, Oklahoma:

> **Lot Forty-three (43), Block Two (2), of the AMENDED PLAT OF SUBURBAN ACRES ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the Recorded Plat thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Saundra J. Hayes, Tulsa Development Authority, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

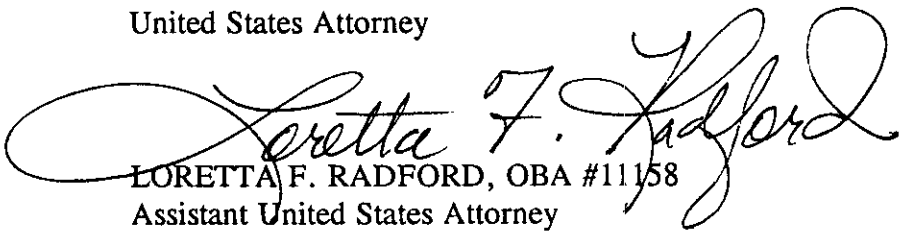
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/John L. Wagner
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
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(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge
Civil Action No. 95-C 577C

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

M. ALI DJAHEDIAN aka MOHAMAD A. DJAHEDIAN; JOYCE A. DJAHEDIAN aka JOYCE DJAHEDIAN; FEDERAL NATIONAL MORTGAGE ASSOCIATION; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 93-C-519-E

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 20th day of March, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on February 7, 1996, pursuant to an Order of Sale dated November 5, 1995, of the following described property located in Tulsa County, Oklahoma:

> **Lot One (1), Block Fourteen (14), WOODLAND VIEW SECOND ADDITION, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

Appearing for the United States of America is Cathryn D. McClanahan, Assistant United States Attorney. Notice was given the Defendant, **M. Ali Djahedian aka Mohamad A. Djahedian**, through his attorney David M. Tracy; Defendant, **Joyce A. Djahedian aka Joyce Djahedian**, personally and through her attorney Norma Eagleton;

Defendant, **Federal National Mortgage Association**, through its attorney Thomas M. Askew; and Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma, by mail; and Purchasers, **Jerrold Hoffman and Barbara Hoffman**, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to **Jerrold Hoffman and Barbara Hoffman, 7880 South 70th East Avenue, Tulsa, Oklahoma 74133**, they being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

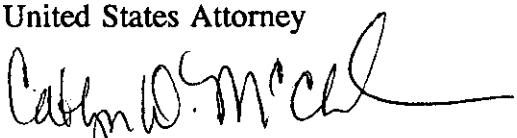
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, **Jerrold Hoffman and Barbara Hoffman, 7880 South 70th East Avenue, Tulsa, Oklahoma 74133**, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchasers by the United State Marshal, the purchasers be granted possession of the property against any or all persons now in possession.

S/John L. Wagner
U.S. Magistrate
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney



CATHRYN D. MCCLANAHAN, OBA #014853
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Report and Recommendation of United States Magistrate Judge
Case No. 93-C-519-E (Djahedian)

CDM:css

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANNE HESSE MORAN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 94-C-700-H

JUDGMENT

This Court entered an order on March 19, 1996 granting Plaintiff's Motion for Summary Judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant make payment to Plaintiff of $25,166.54, with interest and costs as provided by law. Judgment is hereby entered for Plaintiff and against Defendant.

IT IS SO ORDERED.

This 20TH day of March, 1996.

Sven Erik Holmes
United States District Judge

15

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CARLOS E. SARDI, on behalf of himself and all others similarly situated,

Plaintiff,

v.

STRUTHERS INDUSTRIES, INC., JOHN C. EDWARDS, G. DAVID GORDON, and MICHAEL B. FINE,

Defendants.

Case No. 94-CV-787-H

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by September 20, 1996, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 20TH day of MARCH, 1996.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOAN DWORKIN,

Plaintiff,

v.

STRUTHERS INDUSTRIES, INC., JOHN C. EDWARDS, and G. DAVID GORDON,

Defendants.

Case No. 94-CV-838-H

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by September 20, 1996, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 20TH day of March, 1996.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TEREX CORPORATION,

Plaintiff,

v.

SANDAHL EXPORTS CORPORATION, a California corporation, et al.,

Defendants.

Case No. 95-CV-288-H

ADMINISTRATIVE CLOSING ORDER

The Parties having entered into a settlement agreement, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, by May 21, 1996, the Parties have not reopened for the purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 20TH day of MARCH, 1996.

Sven Erik Holmes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AVIATION RESOURCES, INC.,

Plaintiff,

v.

IVEX CORPORATION,

Defendant.

Case No. 95-C-14-H

ADMINISTRATIVE CLOSING ORDER

The Plaintiff having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the Parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, within thirty (30) days of a final adjudication of the bankruptcy proceedings, the Parties have not reopened for purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 20TH day of MARCH, 1996.

Sven Erik Holmes
United States District Judge

24

ENTERED ON DOCKET
DATE 3-21-96

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 20 1996
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

SOUTHWEST LABORATORY OF OKLAHOMA, INC., an Oklahoma corporation,

Plaintiff,

v.

COMPUCHEM ENVIRONMENTAL CORPORATION, a Massachusetts corporation,

Defendant.

Case No. 95-CV-1118-H

ADMINISTRATIVE CLOSING ORDER

The Defendant having filed its petition in bankruptcy and these proceedings being stayed thereby, it is hereby ordered that the Clerk administratively terminate this action in his records, without prejudice to the rights of the Parties to reopen the proceedings for good cause shown for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If, within thirty (30) days of a final adjudication of the bankruptcy proceedings, the Parties have not reopened for purpose of obtaining a final determination herein, this action shall be deemed dismissed with prejudice.

IT IS SO ORDERED.

This 20TH day of MARCH, 1996.

Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET
3-21-96

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	FILED
	)	
MICHAEL WADE BORRELL aka Mike Borrell; SHARON JEAN BORRELL aka Sharon Borrell; COUNTY TREASURER, Osage County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma,	)	MAR 20 1996
	)	Richard M. Lawrence, Court Clerk
	)	U.S. DISTRICT COURT
	)	
	)	
	)	
Defendants.	)	Civil Case No. 95 C 1169H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20th day of MARCH, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Osage County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, appear by John S. Boggs, Jr., Assistant District Attorney, Osage County, Oklahoma; and the Defendants, MICHAEL WADE BORRELL aka Mike Borrell and SHARON JEAN BORRELL aka Sharon Borrell, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, MICHAEL WADE BORRELL aka Mike Borrell, signed a Waiver of Summons on December 14, 1995; that the Defendant, SHARON JEAN BORRELL aka Sharon Borrell, was served a copy of Summons and Complaint on January 24, 1996, by Certified Mail; that Defendant, COUNTY TREASURER, Osage County, Oklahoma, was served a copy of

Summons and Complaint on November 29, 1995, by Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, was served a copy of Summons and Complaint on November 29, 1995, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Osage County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, filed their Answer on December 1, 1995; and that the Defendants, MICHAEL WADE BORRELL aka Mike Borrell and SHARON JEAN BORRELL aka Sharon Borrell, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, MICHAEL WADE BORRELL, is one and the same person as Mike Borrell, and will hereinafter be referred to as "MICHAEL WADE BORRELL." The Defendant, SHARON JEAN BORRELL, is one and the same person as Sharon Borrell, and will hereinafter be referred to as "SHARON JEAN BORRELL." The Defendants, MICHAEL WADE BORRELL and SHARON JEAN BORRELL, are both single unmarried persons.

The Court further finds that on March 2, 1995, Michael Wade Borrell filed his voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 95-00577-W. On June 26, 1995, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on August 15, 1995.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Osage County, Oklahoma, within the Northern Judicial District of Oklahoma:

THAT PART OF THE WEST HALF OF THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER OF THE NORTHEAST QUARTER (W/2 NW/4 SE/4 NE/4) OF SECTION THIRTY-TWO (32), TOWNSHIP TWENTY-ONE (21) NORTH, RANGE TWELVE (12) EAST OF THE INDIAN MERIDIAN, LYING WEST OF COUNTY ROAD, OSAGE COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE U.S. GOVERNMENT SURVEY THEREOF.

The Court further finds that on January 5, 1987, the Defendants, MICHAEL WADE BORRELL and SHARON JEAN BORRELL, executed and delivered to CHARLES F. CURRY COMPANY, their mortgage note in the amount of $38,717.00, payable in monthly installments, with interest thereon at the rate of Eight and One-Half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, MICHAEL WADE BORRELL and SHARON JEAN BORRELL, HUSBAND AND WIFE, executed and delivered to CHARLES F. CURRY COMPANY, a mortgage dated January 5, 1987, covering the above-described property. Said mortgage was recorded on January 8, 1987, in Book 708, Page 274, in the records of Osage County, Oklahoma.

The Court further finds that on January 18, 1991, CHARLES F. CURRY COMPANY, assigned the above-described mortgage note and mortgage to Secretary of Housing and Urban Development, c/o Housing and Urban Development. This Assignment of Mortgage was recorded on February 1, 1991, in Book 787, Page 24, in the records of Osage County, Oklahoma.

The Court further finds that on February 1, 1991, the Defendants, MICHAEL WADE BORRELL and SHARON JEAN BORRELL, entered into an agreement with the

Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on July 1, 1991, June 1, 1992, January 1, 1993, July 1, 1993, January 1, 1994 and August 1, 1994.

The Court further finds that the Defendants, MICHAEL WADE BORRELL and SHARON JEAN BORRELL, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, MICHAEL WADE BORRELL and SHARON JEAN BORRELL, are indebted to the Plaintiff in the principal sum of $43,861.09, plus interest at the rate of 8.5 percent per annum from March 20, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, have a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $16.90, plus penalties and fees. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, MICHAEL WADE BORRELL and SHARON JEAN BORRELL, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, MICHAEL WADE BORRELL and SHARON JEAN BORRELL, in the principal sum of $43,861.09, plus interest at the rate of 8.5 percent per annum from March 20, 1995 until judgment, plus interest thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, have and recover judgment in the amount of $16.90, plus penalties and fees, for personal property taxes for the year 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, MICHAEL WADE BORRELL and SHARON JEAN BORRELL, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, MICHAEL WADE BORRELL and SHARON JEAN BORRELL, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Osage County, Oklahoma, in the amount of $16.90, plus penalties and fees, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

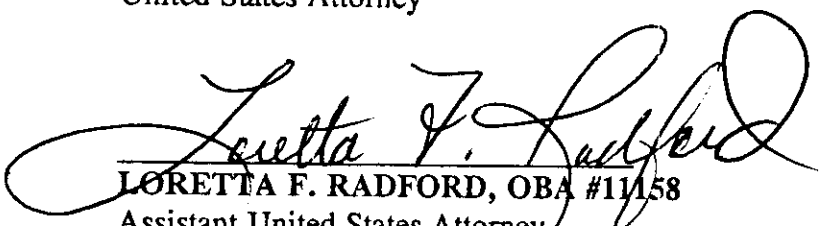
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the

Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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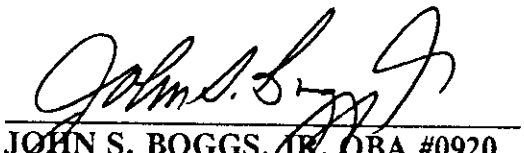

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Osage County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95 C 1169H

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLYDE C. PATRICK, JR.; VICKI S. PATRICK; CITY OF GLENPOOL, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C 1043H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 20th day of MARCH, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, CLYDE C. PATRICK JR., VICKI S. PATRICK, CITY OF GLENPOOL, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, CLYDE C. PATRICK, JR. and VICKI S. PATRICK, are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendant, CLYDE C. PATRICK JR., was served with process on February 6, 1996; the Defendant, VICKI S. PATRICK, was served with process on February 6, 1996; and that the

Defendant, CITY OF GLENPOOL, Oklahoma, acknowledged receipt of Summons and Complaint via certified mail on October 20, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on November 3, 1995; and that the Defendants, CLYDE C. PATRICK JR., VICKI S. PATRICK, and CITY OF GLENPOOL, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Fifteen (15), Block Nine (9), ROLLING MEADOWS II, an Addition to the City of Glenpool, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on April 4, 1989, the Defendants, CLYDE C. PATRICK JR. and VICKI S. PATRICK, executed and delivered to FIRST MORTGAGE TRUST CORPORATION d/b/a FIRST MORTGAGE CORP. their mortgage note in the amount of $44,500.00, payable in monthly installments, with interest thereon at the rate of 8.435 percent per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, CLYDE C. PATRICK JR. and VICKI S. PATRICK, husband and wife, executed and delivered to FIRST MORTGAGE TRUST CORPORATION d/b/a FIRST MORTGAGE CORP. a mortgage dated August 4, 1989, covering the above-

described property. Said mortgage was recorded on August 7, 1989, in Book 5199, Page 1655, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 10, 1989, FIRST MORTGAGE TRUST CORPORATION d/b/a FIRST MORTGAGE CORP. assigned the above-described mortgage note and mortgage to MORTGAGE CLEARING CORPORATION. This Assignment of Mortgage was recorded on September 26, 1989, in Book 5209, Page 2483, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 25, 1990, MORTGAGE CLEARING CORPORATION assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, his successors and assigns. This Assignment of Mortgage was recorded on June 26, 1990, in Book 5261, Page 728, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 1, 1990, the Defendant, CLYDE C. PATRICK JR., entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on July 1, 1992.

The Court further finds that the Defendants, CLYDE C. PATRICK JR. and VICKI S. PATRICK, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, CLYDE C. PATRICK JR. and VICKI S. PATRICK, are indebted to the Plaintiff in the principal sum of $64,200.42, plus interest at the rate of 8.435 percent per

annum from April 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $39.00 which became a lien on the property as of June 23, 1994; a lien in the amount of $37.00 which became a lien as of June 25, 1993; a lien in the amount of $41.00 which became a lien as of June 26, 1992; and a lien in the amount of $12.00 which became a lien as of June 20, 1991. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, CLYDE C. PATRICK JR., VICKI S. PATRICK, and CITY OF GLENPOOL, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, CLYDE C. PATRICK JR. and VICKI S. PATRICK, in the principal sum of $64,200.42, plus interest at the rate of 8.435 percent per annum from April 1, 1995 until judgment, plus interest

thereafter at the current legal rate of 5.25 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $129.00, plus costs and interest, for personal property taxes for the years 1990-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, CLYDE C. PATRICK JR., VICKI S. PATRICK, CITY OF GLENPOOL, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, CLYDE C. PATRICK JR. and VICKI S. PATRICK, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $129.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

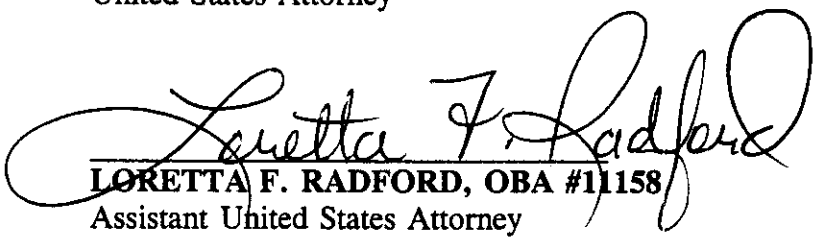
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ SVEN ERIK HOLMES

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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Judgment of Foreclosure
Civil Action No. 95-C 1043H

LFR/lg